88-643

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,

Petitioner,

v.

THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does action taken as a result of lawful reliance upon a lower court's judgment granting a permanent injunction, coupled with respondent's failure to seek a stay, render an appeal moot?

2. Can the power of the Virgin Islands' Public Services Commission to regulate the sale of a utility's stock by an existing shareholder to a prospective shareholder be inferred from the Virgin Islands enabling legislation 30 V.I.C. §§ 1 through 44?

3. Does the Virgin Islands pre-amendment legislation governing utility regulation, as interpreted by the Third Circuit to apply to the sale of utility stock from one non-utility to another non-utility, constitute an impermissible restraint on interstate commerce under the principles set forth in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Atlantic Tele-Network Co., a Virgin Islands corporation, the Appellants below, and the Respondents herein, the Public Services Commission of the Virgin Islands and Patrick M. Rice, its Executive Director. As a result of the District Court's decision, the Petitioner owns all the outstanding stock of (i) the Virgin Islands Telephone Corporation and (ii) VitelCom, Inc. Forty-five percent (45%) of Petitioner's stock is issued to E.F. Hutton LBO, Inc., a subsidiary of E.F. Hutton Group, Inc. which has been acquired by Shearson Lehman Brothers, Inc.

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THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS, PATRICK M. RICE, EXECUTIVE DIRECTOR OF THE PUBLIC SERVICES COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Atlantic Tele-Network Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. The opinion was filed March 10, 1988, and a timely filed petition for rehearing and suggestion of rehearing en banc was denied on July 18, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, No. 87-3485, reversing the District Court, is reported at 841 F.2d 70 (1988), and is reprinted in the appendix hereto, pp. 1a through 10a.

The decision of the United States District Court of the Virgin Islands, Division of St. Thomas and St. John, rendered by the Honorable Almeric L. Christian, has not been reported. The official transcript of the judge's decision rendered June 19, 1987, and the Court's order is reprinted in the appendix hereto, pp. 11a through 27a.

JURISDICTION

Invoking jurisdiction under Section 22 of the Virgin Islands' Revised Organic Act of 1954, 48 U.S.C. § 1612, the Petitioner brought this suit in the District Court of the Virgin Islands. On June 5, 1987, Petitioner moved for summary judgement on the second, third and fifth causes of action. On June 19, 1987, the District Court granted Petitioner's motion for summary judgment of the third cause of action and granted a permanent injunction against the Public Service Commission's interference with the consummation of the sale.

On Respondent's timely appeal, the Third Circuit having jurisdiction under 28 U.S.C. § 1291, heard oral arguments and rendered an opinion dated March 10, 1988, reversing the judgment of the District Court and remanding the case for further proceedings. Petitioner's petition for rehearing and suggestions of rehearing en banc, filed March 23, 1988, was denied on July 18, 1988.

The jurisdiction of the Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of Title 30, Chapter 1, Subchapter I, of the Virgin Islands Code ("V.I.C.").

Applicable sections of Title 30, Chapter 1 of the Virgin Islands Code are set forth in the Appendix hereto, pp. 39a through 49a.

Act No. 5258 passed by the Seventeenth Legislature of the Virgin Islands of the United States is set forth in the Appendix hereto, pp. 50a through 52a.

STATEMENT OF THE CASE

ITT Corporation (hereinafter ITT Corporation and its subsidiaries are collectively referred to as "ITT") purchased the telephone system from the Virgin Islands Government in 1959. The sale of the telephone company to ITT and the issuance of the franchise agreement was approved by the Virgin Islands Legislature as part of the same bill, No. 1039, which became effective October 9, 1959. On October 30, 1959, the Virgin Islands Government executed the franchise agreement for the telephone company and a sale agreement was executed with ITT. The franchise agreement restricts the transfer of the franchise. The sale agreement provided there could be no transfer of the telephone company stock by ITT for a period of *five* years.[1]

In January, 1986, Jeffrey J. Prosser ("Prosser"), now an owner of 27 1/2% of Petitioner's outstanding stock,

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[1] 30 V.I.C. § 42 provides that nothing contained in the chapter setting forth the statutory scheme to regulate utilities shall be construed to alter or amend the terms of any contract or franchise entered into prior to January 1, 1965.

commenced negotiations with ITT regarding the acquisition of the stock of the Virgin Islands Telephone Corporation ("Vitelco"), the last local telephone exchange operated by ITT.

Vitelco was a company with no debt. For regulatory purposes the PSC used a hypothetical capital structure treating Vitelco as if it had a 55/45 debt to equity ratio.

After negotiations resulted in agreement upon price and basic terms, in August, 1986, ITT informed the then Governor of the Virgin Islands of the possible sale of the Vitelco stock.

On August 21, 1986, a preliminary agreement regarding the sale of the Vitelco stock was entered into with ITT. The ITT Board of Directors approved the preliminary agreement on September 9, 1986.

On or about September 11, 1986, the Virgin Islands Public Services Commission ("PSC") was notified of the impending sale.

At that time, there was no statute which expressly gave the PSC regulatory authority over the sale of a utility's stock by a shareholder to a prospective shareholder. The PSC regulations contain no provision that provides for any notice or application process to the PSC for a stock sale. In fact, the ownership of Vitelco's stock changed several times from one ITT subsidiary to another between 1959 and 1986 without PSC approval.

In November, 1986, all required Federal Communication Commission ("FCC") applications were filed. The principals of Petitioner were Prosser, Edmund Blankenau ("Blankenau"), Craig Swoboda ("Swoboda"), and Mid-America Communications Company, a corporation indirectly controlled by Blankenau and Swoboda.

On January 9, 1987, the final contract was executed between Petitioner and ITT. The contract required closing on or before February 15, 1987.

The PSC scheduled its first hearing on the sale of Vitelco stock for January 23, 1987, and gave Petitioner notice of such hearing on or about January 12, 1987.

The FCC approved the change in control in January, 1987.

The principals and representatives of Petitioner attended PSC meetings held on January 23, February 5, and February 21 of 1987. At all times Petitioner's principals and representatives contested the exercise of jurisdiction by the PSC.

On April 1, 1987, there was a change in the principals of Petitioner. Thereafter, the principals of Petitioner were Prosser, Cornelius B. Prior, Jr. ("Prior"), a then Managing Director of Kidder, Peabody & Co., who headed the firm's Telecommunications Finance Group, and E.F. Hutton LBO, Inc., a subsidiary of E.F. Hutton Group, Inc. ("collectively referred to as "Hutton"). The PSC was informed of the change in principals at its April 2, 1987, PSC hearing.

The previous hearings, January 23rd, February 5th, and February 21st, involved proposed financing by The First National Bank of Chicago which was a loan with a weighted average life of four and one-half years. With Hutton, the financing plan changed to a short-term bridge loan provided by Hutton which would be refunded by the sale of fifteen year bonds issued by Petitioner and preferred stock (the "Hutton Financing"). All information regarding the new financial proposal was provided to the PSC prior to the April 21, 1987, hearing.

On April 21, 1987, the PSC held its final and only hearing on the Hutton Financing. It was at this meeting that the PSC authorized the issuance of PSC Order No. 22-1987 (the "Order") which was dated April 23, 1987. This Order is the subject matter of this controversy. The only financing proposal which is the subject matter of the Order is the Hutton Financing. The Order is reprinted in the Appendix hereto, pp. 30a through 38a.

The final paragraph of the Order provided:

> "Providing all the terms of this order are met by ATN, ITT and Vitelco, and compliance with the terms hereof are certified in writing to the Commission and

> *confirmed by the Commissions staff*, the proposed sale of stock by ITT to ATN may proceed." (Emphasis Added)

The PSC's Chief Counsel, Maria T. Hodge, Esq. and Jamshed K. Madan, the PSC's Chief Consultant, act in the capacity of the Commission's staff.

Petitioner attempted to comply with the Order. After having extensive conversations with the Commission's staff, Petitioner made two separate submissions, one on May 7th and the second revised submission on May 15th intending to comply with the Order. Notwithstanding making substantial changes pursuant to the directions of the PSC's Chief Counsel's, Maria Hodge, Petitioner's second submission was not confirmed by the PSC's staff.

On May 18th, the legislature of the Virgin Islands passed Act No. 5258 giving the PSC statutory jurisdiction over the sale of a utility stock. The Governor of the Virgin Islands signed the bill into law on May 19, 1987. This bill is broad enough that it restricts the public utility from transferring even a single share on its books and records, unless authorized by the PSC.

After the new legislation, in lieu of confirming Petitioner's compliance with the Order, the PSC scheduled a May 22, 1987, meeting without the proper statutory notice. Since Petitioner refused to waive the statutory notice this meeting was rescheduled for June 9, 1987. The order, No. 25-1987, scheduling the new meeting is set forth in the Appendix hereto, p. 57a.[2]

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[2] The Third Circuit decision stated "Five days later, ATN filed a petition for reconsideration of the PSC's April 23, order . . . The PSC scheduled a hearing on this petition . . . " 841 F.2d at 72. This is a distortion of facts to make it appear the PSC was proceeding within the bounds of due process. Rather, ATN's willingness to comply with the Order surprised the PSC. After the new law was passed the PSC tried, without notice, to schedule a meeting May 22. ATN, the petitioner, did

(Continued on following page)

On May 22, 1987, Petitioner filed a motion for reconsideration of the Order.

On June 2, 1987, the Petitioner filed this action as a declaratory judgement action which collaterally attacked the PSC's jurisdiction and the Order.[3] The complaint consisted of five separate causes of action including the first cause of action which alleged compliance with the Order and requested relief in the form of the Court ordering the Commission's staff to confirm Petitioner's compliance with the Order.

ITT is not a party to the case.

On June 5, 1987, the Petitioner moved for summary judgment on the second, third and fifth causes of action set forth in the Petition. For the limited purposes of Petitioner's motion, the findings of fact set forth in the Order were accepted as correct.[4] After permitting both sides to brief and argue the motion for summary judgment, on June 19, 1987, announcing his decision in open court, the Honorable Almeric L. Christian, Chief Judge, ruled in favor of the Petitioner's motion for summary judgment. The Judge held:

> "In closing, I would make clear what has been today decided. Nothing here said speaks to the powers of the PSC to regulate once the same has been consummated, if it is consummated and whatever be

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not file a motion for reconsideration until May 22. Why the attempted May 22 meeting? The only apparent purpose was to unilaterally (on its own motion) withdraw the Order and issue a new order with more onerous provisions. In no case could the May 22 hearing, subsequently moved to June 9th, been for the purpose of dealing with Petitioner's motion for reconsideration since that motion was not filed until May 22, 1987.

[3] The Order as of this date is not final. It is being contested in separate litigation captioned *Atlantic Tele-Network Co. v. Public Services Commission of the Virgin Islands*, Civil No. 87-347.

[4] See Footnote No. 3.

> the basis of such consummation. Nor is the amendment declared invalid. This court holds no more than that under existing law, as is obtained prior to the May 1987 amendment the PSC was not empowered to grant or withhold it's approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale. We hold also that Act No. 5258 may not be applied to the contract with which we are concerned in this instant matter, for to do so, would be to run afoul of the Contract Clause of the Constitution of the United States, extended to this territory by the Revised Organic Act of the Virgin Islands."

See transcript of the Judge's decision read in open court which is set forth in the Appendix hereto, pp. 11a through 25a.

On June 24, 1987, relying upon the opinion of the Chief Judge of the District Court, and relying upon the failure of the PSC to seek a stay from the Third Circuit Court of Appeals, Petitioner acquired the Vitelco stock from ITT. Consummation of the transaction required in excess of Ninety Million Dollars ($90,000,000). The contract expired February 15, 1987, and Petitioner's last extension of the contract expired June 20, 1987.

On December 29, 1987, relying upon the unstayed judgment of the District Court, Petitioner entered into a 15 year loan with the Rural Telephone Financing Corporation ("RTFC"). As part of that loan, as in the case of any financing agreement, Petitioner pledged the assets of Vitelco as collateral. The proceeds of this loan were used to retire the loan from Hutton.

Petitioner formed a new entity to conduct deregulated activities, VitelCom, Inc., and many of Vitelco's assets engaged in deregulated business were transferred thereto.

Though facts were not an issue in the Motion for Summary Judgement, the PSC, before the Third Circuit, engaged in a factual argument to persuade the Third

Circuit that jurisdiction was in the "public interest." Respondent's briefs were replete with errors:

(i) characterizing as admissions statements which were not admissions;

(ii) submitting irrelevant data as relevant;

(iii) omitting relevant data necessary for a fair presentation of the facts; and

(iv) distorting the facts.

Since facts were not in issue or relevant to the nature of the Motion, Petitioner ignored Respondent's factual arguments.

As example only, and not by any means a limitation, Swoboda made the statement set forth in the Appendix hereto, pp. 62a through 69a, in an attempt to avoid confrontation and commence negotiations of Petitioner's differences with the PSC staff. However, in Respondent's briefs before the Third Circuit the statements, which were not admissions, were presented as admissions against Petitioner's interest. See the Appendix hereto, pp. 59a to 61a. Note that Swoboda was not a principal or agent of Petitioner after April 1, 1987, and the First Chicago financing proposal, the subject matter of the February 5, 1987, hearing and the Swoboda statement, was *not* the proposed financing that was the subject matter of PSC Order No. 22-1987. Yet, Respondent's counsel states in her brief to the Third Circuit that Petitioner agreed the proposed financing would be detrimental to ratepayers, implying, if not misrepresenting, that the statement was about the Hutton Financing that is the subject of PSC Order No. 22-1987 and this case.

Apparently, compelled by the need for jurisdiction or, as stated in page 8 of the Third Circuit's decision " . . . if the sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such

financial stability, it *must* be able to act effectively[5], . . . " (Emphasis Added) the Third Circuit found:

> (i) "Vitelco is a public utility." 30 VIC § 1(a)(3)(1976). *See* 841 F.2d at 73.
>
> (ii) "Although we agree that the PSC has no authority to regulate the conduct of Petitioner or ITT per se, . . . " [since neither is a public utility within the meaning of 30 VIC § 1(a)(3)(1976)]. *See, Id.* bracketed language added.
>
> (iii) "Although no statutory provision enacted before the May 1987, amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme." *See, Id.*

Concluding that the pre-amendment statutory scheme granted jurisdiction, the Third Circuit concluded that it was unnecessary to review whether the statutory amendment to the sale would violate the "Contract Clause" if applied to the Petitioner's acquisition of the Vitelco stock from ITT. The Third Circuit reversed the judgment of the district court and remanded the case for further proceeding.

On March 23, 1988, Petitioner filed a Petition for Rehearing and Suggestion of Rehearing En Banc. On July 18, 1988, the Third Circuit denied petitioner's motion.

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[5] The Third Circuit failed to examine the statutory scheme for the broad authority the PSC could exercise over Vitelco after the sale to protect ratepayers.

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF DUE PROCESS TO A REGULATED TERRITORIAL UTILITY BY THE TERRITORIAL REGULATORY BOARD PRESENTS A NEW AND IMPORTANT QUESTION AFFECTING INTERNATIONAL RELATIONS.

The PSC cloaked its proceedings with the appearance of due process by holding hearings pursuant to notice to the affected parties. Behind this facade, however, the PSC has deprived Petitioner of due process by, among other things,

1) Abusing its scheduling power by scheduling its first public hearing January 23, 1987, some four months after it was first notified of the proposed stock sale;

2) requiring Petitioner to provide information concerning a transaction over which the PSC has no authority;

3) causing Petitioner to incur unnecessary and excessive costs because of delays in the sale caused by the PSC proceedings and the presentation of voluminous information to the PSC in those proceedings;

4) jeopardizing the acquisition of the Vitelco stock[6];

5) requiring the voluntary submission of all Vitelco deregulated activities and all of Petitioner's activities to PSC regulation as a prerequisite to a negotiated settlement;

6) placing restrictions upon the transfer of Vitelco stock from ITT to Petitioner without statutory authority to do so;

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[6] The original contract required closing on or before February 15, 1987. ITT granted several extensions but not without extracting interest. When the transaction closed on June 24, 1987, there was no formal extension of the contract which bound ITT to sell the Vitelco stock to Petitioner. Petitioner paid interest to ITT because of the delayed closing in excess of a million dollars.

7) setting forth conditions under which it would approve the sale of stock by ITT and then rejecting Petitioner's attempts to comply with those conditions;

8) violating the Virgin Islands Government in the Sunshine Act, 1 V.I.C. §§ 251-256, by holding non-public meetings to discuss the sale and by declaring executive sessions to debate and decide its orders[7];

9) demanding Petitioner waive its right to appeal the Order, No. 22-1987 dated April 23, 1987, placing the conditions on the ITT stock sale in return for PSC approval of ATN's compliance with the Order; and

10) when Petitioner refused to waive its right to appeal, lobbying the legislature through the PSC's Chief Counsel for an ex post facto statute authorizing the PSC to block the sale.

Perhaps the most glaring example of this abuse of power however is the conflicting roles played by the PSC's Chief Counsel, Maria T. Hodge, and the PSC's primary consultant, Jamshed Madan. During the course of the proceedings, they acted in the following capacities, (i) as the prosecutor and chief advocate against the acquisition, (ii) as the agents for the PSC in all negotiations with Petitioner, (iii) as the PSC's staff (delegated the power to confirm Petitioner's compliance with the Order), and (iv) as a member of the PSC by participating in executive sessions while Petitioner representatives were excluded.

During the appeal of this case to the Third Circuit the denial of due process continued unabated. For example,

1) when Vitelco responded to a PSC petition to decrease rates with a request for rate increase, the PSC

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[7] ATN's principals and agents did not know the content of the Order, No. 22-1987, until they received it because the content of the Order was debated and decided upon in executive session. The decision in the public meeting was to approve the PSC's decision made in executive session. See Appendix pp. 53a through 56a.

used its powers to bifurcate the rate decrease (Docket 314) from the rate increase (Docket 316), proceeding simultaneously with the intent to deny Vitelco the benefit of a 1985 settlement specifying the return on rate base for the next rate proceeding[8];

2) the PSC's Chief Counsel in the appeal engaged factual distortions to persuade the Third Circuit that the sale by ITT of Vitelco stock was not in the public interest[9]; and

3) the PSC's power was being used to accomplish objectives not within its power by offering to settle all outstanding matters if (i) Prosser and Prior would resign, (ii) if Petitioner would consent to regulation, and (iii) if all deregulated businesses of Vitelco would submit to regulation.

Since the Third Circuit's decision in this case, the PSC has become bolder and more open with its denial of due process. At the same time, it impeached its own arguments before the Third Circuit. The crux of the PSC's factual argument before the Third Circuit and of the "Order" was that the acquisition was not financially sound and that Vitelco would have to have huge rate increases to pay Petitioner's debt and to maintain Vitelco's level of service to the consumers. In fact, Vitelco has increased its capital expenditure program to

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[8] The 1985 rate case settlement specified the hypothetical capital structure and the return on rate base Vitelco would be allowed in the next rate case. By separating cases, the PSC could purport to use previously agreed upon assumptions for one case and then use the new docket to further reduce the return on rate base by changing the assumptions and methodology used to set rates in the second case. In effect, denying Vitelco benefit of the 1985 settlement.

[9] Petitioner ignored the distortion of the record to avoid being drawn into factual argument when the case involved purely issues of statutory interpretation.

approximately $10,000,000 a year while paying enough dividends to Petitioner to service the RTFC's debt. The PSC, instead of granting rate increases, used its two dockets to decrease Vitelco's revenue by approximately $4,200,000 (Arthur Anderson's certified financial statements show local service operating revenue for 1987 of $18,067,000). In effect, Vitelco was given a 5.634% after-tax return on rate base: lower than any other telephone rate case reported in *Regulatory Focus, Major Rate Cases, January 1980 – December 1987*, published by Regulatory Research Associates, Inc.[10] In addition, among other items, the PSC ordered Vitelco to hold all dividends in escrow until the resolution of Docket 301; the docket dealing with the acquisition. Petitioner's only source of capital that will permit Petitioner to fully service the debt to RTFC are the dividends from Vitelco.[11]

The PSC has interpreted the Third Circuit's decision as authorizing the PSC's jurisdiction over all the affairs of Petitioner. Further, a footnote in the Third Circuit's opinion mentioning rescission has been interpreted as authorizing rescission. This is a case and controversy with Vitelco facing an uncertain but litigious future.

The United States Virgin Islands are located in the Caribbean. President Reagan's Caribbean Basin Initiative recognizes the Caribbean as an area of strategic importance to the United States. The Honorable Ron DeLugo, a

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[10] Vitelco's growth in access lines has been at least an average of over six percent over the last five years (one of the highest in the nation) indicating Vitelco should be given a higher rate of return than other telephone companies. Further, when Vitelco was 100% capitalized the PSC used a hypothetical capital structure (55% debt, 45% equity) to set rates. Now the PSC changed rate setting methodology to look through to Petitioner and treat Vitelco as a capital structure of 100% debt.

[11] Query, was the purpose for the legitimate public interest?

delegate from the Virgin Islands, stated before the Senate's Committee On Energy and Natural Resources, with respect to the Caribbean Basin Initiative that:

> "These islands in the Eastern Caribbean are closely tied to the U.S. Virgin Islands. We share a common history and culture. . . . For our neighboring islands, the U.S. Virgin Islands *is* the United States." *S. Hearing*, 98-159, June 10, 1983, pp. 14-15.

In the appendix to the Senate report, in response to questions on the economic problems in the Virgin Islands, it was reported:

> "The most pressing economic problems in the Virgin Islands today are insufficient industrial development and insufficient revenues to meet pressing infrastructure needs, such as water and power and the local share of the St. Thomas airport project.
>
> Despite the tax and customs advantages offered to attract businesses to the Virgin Islands, we have not been able to supplant the Government of the Virgin Islands as the major local employer. Industry avoids locating in the Virgin Islands because of the high water and power costs, the unreliability of these utilities, and the high shipping costs from the Virgin Islands." *S. Hearing*, 98-159, June 10, 1983, p. 104.

The 1980 census information lends support to the above statements. Out of a 1980 employed work force of 35,652, the local government employed 10,480 (29.4%) and the federal government employed 1,618 (4.54%) for a combined government employment of 12,098 or 33.93% of the employed work force in the Virgin Islands.

The Virgin Islands two critical problems are the lack of insufficient private employment and a weak infrastructure. Vitelco, a wholly owned subsidiary of Petitioner, is the second largest employer and an important element of the Virgin Islands infrastructure. This controversy threatens an element of the infrastructure that the Virgin Islands should be promoting – the role of the private

investor in providing private utilities.[12] Secondly, the abuse of due process distorts the perception of the private investors role in our economy to all the nations of the Caribbean.

In sanctioning this abuse of power by the PSC, the Third Circuit Court of Appeals committed errors so grave as to endanger the perception of democracy in the Caribbean.

II.

THE INFERENCE OF JURISDICTION IS DANGEROUSLY AND IMPERMISSIBLY OVERBROAD, CONFLICTS WITH SUPREME COURT PRECEDENT AND CANNOT BE RECONCILED WITH WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

As a summary, the District Court held:

(i) that Act No. 5258, granting the PSC jurisdiction over the sale of Vitelco Stock could not be applied in this case of ATN's acquisition or the Contract Clause of Constitution would be violated; and

(ii) the PSC had no jurisdiction over the sale under the pre-amendment statutory scheme.

The Third Circuit found that power over the sale " . . . must be inferred from the pre-amendment statutory scheme." The Third Circuit vacated the judgment and remanded the case.

The Third Circuit's decision is in direct and apparent conflict with prior Supreme Court precedent, *Board of Governors v. Dimension Fin.*, 474 U.S. 361 (1986), and *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986), which struck down result-oriented decisions.

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[12] Many nations of the Caribbean are experimenting in some form of privatization of their respective utilities. The rule of law established by the Third Circuit's decision indicates that the United States discourages the present trend toward privatization efforts that are currently widespread in the Caribbean.

A review of Title 30, Chapter One, Subchapter I of the Virgin Islands Code ("V.I.C.") sets forth in plain, unambiguous language a statutory scheme granting jurisdiction over the services and facilities of public utilities and charging the PSC with the jurisdiction to control rates, services, and the manner of delivery of those services. The key provisions are:

§ 1. Public utilities subject to regulation; definition; financial interests of members of Commission

(a) The following services provided by an individual, firm, co-partnership, association, corporation or other person for compensation are declared to be affected with a public interest and are defined to be a public utility subject to this chapter, and the person providing such service to be a 'public utility'.

(1) lighterage and cargo handling;

(2) dockage, wharfage, or related cargo services;

(3) telephone service;

(4) water supply services; except retail deliveries;

(5) electric power service;

(6) passenger services by motor busses or trucks;

(7) public marine passenger transportation services operating under government grant of exclusive franchise.

§ 2. Just and reasonable rates and services

Every public utility doing business within the Virgin Islands is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished, or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the Commission.

§ 41. Liberal interpretation

> . . . The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied and incidental power which may be proper and necessary to effect and carry out, perform and execute all said powers herein specified, mentioned and indicated. . . .

With respect to the pre-amendment statutory scheme, the Third Circuit concluded:

> "Although no statutory provision enacted before the May, 1987 amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme."[13] See p. 8a.

The Third Circuit ignored a well settled canon of statutory construction: a statute must be interpreted according to its plain language absent an ambiguity. *Chevron U.S.C. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *U.S. v. Apfelbaum*, 445 U.S. 115, 121 (1980); *U.S. v. Turkette*, 452 U.S. 576, 580 (1981); *Howe v. Smith*, 452 U.S. 473, 483 (1981). The Third Circuit found no such ambiguity. Interpretation should have then ended with the plain language of the statute.

In addition, the Third Circuit acknowledged, "Although we agree that the PSC has no authority to regulate the conduct of ATN or ITT per se, . . . ".[14] The Third Circuit ignored well founded requirements of due process that there must be both subject matter jurisdiction and jurisdiction over the person before a court may decide a case. *Insurance Corp. v. Compagnee Des Bauxites*, 456 U.S. 694 (1982). The pre-amendment statutory scheme

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[13] The Third Circuit concedes that the statutory schemes does not provide jurisdiction of the subject matter, a stock sale, and that the statutory scheme provides no jurisdiction over the person, ATN or ITT.

[14] See Footnote No. 14.

confers no jurisdiction over the sale of utility stock by its owner and no jurisdiction over Petitioner or ITT. It is a fundamental principle that an administrative agency may only exercise those powers granted to it by the legislature that created it. *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986). Jurisdiction cannot be inferred merely because the business is affected in part with public interest. In his opinion in *Chesapeake and Potomic Telephone Company v. Manning*, 186 U.S. 238 (1902), Justice Brewer stated:

> "Again, while a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations with private capital and for private benefit, the language of such regulations will not be broadened by implication. In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." *Id.* at 248.

The Virgin Islands Code, Title 30, supports Petitioner's proposition. The Code, and the PSC regulations are devoid of any procedure, forms, or standards regarding the sale of a utility stock.

The legislative history supports the District Court Judge's interpretation of the statutes. One legislative bill, No. 1039, effective October 9, 1959, authorized the sale of telephone company to ITT and the issuance of a franchise for the telephone company. The franchise agreement and sale agreement were exhibits to the legislative bill. Both were executed on the same day, October 30, 1959. The franchise agreement restricted its transfer. The sale agreement executed with ITT only restricted the sale of stock for five years.[15] The above demonstrates that the legislature

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[15] 30 V.I.C. § 42 provides that nothing contained in the chapter setting forth the statutory scheme to regulate utilities

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understood the difference between the transfer of a franchise and the sale of the utility's stock by its owner, electing to control only the former.

The action of the Virgin Islands Legislature in passing Act No. 5258, expressly giving the PSC jurisdiction over the sale of a utility's stock by its owner, supports Petitioner's interpretation of the pre-amendment statutory scheme. The transcript of the legislative proceedings in considering this Act reveal that the legislative counsel was of the opinion that, under the pre-amendment statutory scheme, the PSC did not have jurisdiction over a stock sale.

The provisions of the Title 30 of the Virgin Islands Code, the legislative history thereof and the actions, as well as the opinion, of the Seventh Legislature of the Virgin Islands of the United States all support the District Court's opinion that the PSC had no authority to approve, disapprove or otherwise condition the sale of a utility's stock by its owner. To conclude otherwise and assume the PSC had jurisdiction under these statutes would leave this statutory scheme lacking many critical elements in detailing proscribed conduct for parties such as the Petitioner. These statutes would then be highly susceptible to an argument that they are unconstitutionally vague under the due process clause. *Jordan v. DeGeorge*, 341 U.S. 223, *reh. den.*, 341 U.S. 956 (1951); *Keyishian v. Board of Regents*, 385 U.S. 675 (1967).

The fact that the Third Circuit would have to decide a constitutional issue, whether the new act can be applied in these facts, does not allow the Third Circuit to depart from the statute when its language is plain and unambiguous and when the legislative history supports its clear meaning. *Lewis v. U.S.*, 445 U.S. 55, 65 (1980).

(Continued from previous page)

shall be construed to alter or amend the terms of any contract or franchise entered into prior to January 1, 1965.

This result-oriented opinion[16] of the Third Circuit is in direct and apparent conflict with the cases cited above and the canons of statutory construction supported by numerous other Supreme Court decisions. Result oriented opinions, "however sound the result," are in direct and apparent conflict with the Supreme Court holding in *Board of Governors v. Dimension Fin.*, 474 U.S. 361 (1986), and *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986).

The Third Circuit has retroactively interpreted the Public Utilities Act (30 V.I.C. §§ 2, 4, 41) in a manner which is dangerously and impermissibly overbroad. The Third Circuit concluded the PSC "must" have this power though there was no examination of the PSC's extensive regulatory authority or of the ability of the PSC to protect the public interest without the inference of jurisdiction. The Third Circuit, without any statutory basis, extended the PSC's powers over the alienability of private property; a fundamental incident of ownership.

A review of state statutes reveal four basic categories addressing ownership or control of public utilities:

1) those which have no statute addressing ownership;

2) those directly prohibiting ownership by any person of more than a percentage of a public utility without prior approval of the PSC;

3) those prohibiting ownership of one public utility by another without prior PSC approval; and

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[16] The "public interest", expressed through the statutory scheme governing the PSC actions, is limited to the nature of services delivered, the safe delivery of those services, and reasonable pricing. To exercise its police powers, the PSC action must bear some relationship to those three areas. It is a legislative, in contrast to the judicial or PSC, prerogative to determine the required nexus before the PSC can exercise its police powers subject to constitutional guarantees.

4) those that may indirectly require PSC approval. By its instant decision – empowering the PSC to condition or prohibit a sale contrary to the plain language of the statutes – the Third Circuit rode roughshod over all of these carefully-honed criteria, standards, distinctions and definitions enacted by the various states. In consequence, the Third Circuit's decision is both fundamentally anomalous and of national significance, and should be reviewed by the Supreme Court.

The importance of Petitioner's subsidiary to the economy of the Virgin Islands coupled with a decision which cannot be reconciled with, either with the rules of statutory construction or Supreme Court precedence, suggests the Court's supervisory powers should be invoked.

III.

THE THIRD CIRCUIT VIOLATED JURISDICTIONAL RULES BY DECIDING A MOOT CASE.

A summary of relevant facts are:

(i) The PSC through several meetings sought to condition or prohibit closing of Petitioner's acquisition of Vitelco stock;

(ii) Petitioner filed an action for the declaratory judgment collaterally attacking PSC Order No. 22-1987;

(iii) ITT, the then owner of the utility stock, was not a party to the proceeding nor did the PSC move to make ITT a party;

(iv) Judge Christian ruled favorably and granted Petitioner's request for a permanent injunction against the PSC restricting interference with the transaction;

(v) The sale closed on June 24, 1987, before the Third Circuit ruled and before the case was argued;

(vi) The new law, Act No. 5258, is applicable to any future transfer since the law was not declared unconstitutional, it was decided only that it could not be constitutionally applied to this case; and

(vii) The Third Circuit ruled against Petitioner's motion to dismiss based upon mootness.

There is nothing in the Code, even as amended, which gives the PSC jurisdiction over the continuing ownership of a utility's stock. As amended, the Code gives the PSC jurisdiction only at a certain point of time: when utility stock is being sold. For instance, if ITT was still the owner of the stock of Vitelco, nothing in the Code, as amended, would give the PSC any jurisdiction over the utility's stock until ITT proposed a transfer of the stock.

The District Court cannot order rescission. ITT was not a party to the action before the District Court. Any court order of rescission must by necessity involve ITT, the seller of the stock. Respondent could have named ITT as a party to this case when it was at the District Court but Respondent did not so elect. Consequently, there is no jurisdiction of the person, ITT, a necessary requisite of due process to any order of rescission. *Insurance Corp. v. Compagnee Des Bauxites*, 456 U.S. 694, 701 (1982); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 280-281 (1912); *Earle, et al. v. McVeigh*, 91 U.S. 503 (1875).

The Third Circuit suggested that the PSC could charge a penalty under 30 V.I.C. § 41. This suggestion ignores the nature of the act. PSC sought to prevent closing without adherence to conditions. The Order provided, "ORDERED that any proposed sale of Vitelco stock by ITT to ATN, or to any other prospective purchaser, which includes any of the following terms and conditions, *shall not be consummated* and *is hereby prohibited*." (Emphasis Added) See p. 5 of the Order. Closing took place, not in violation of the Order, but after a then legally valid judgment and a grant of a permanent injunction. Since the closing took place while the District Court's order was still in effect, the PSC has no more right to penalize the Petitioner for its ownership of the Vitelco stock than it would have a right to penalize ITT if it still owned the stock.

The sale having taken place legally and the Court having no jurisdiction over ITT, no effective relief can be ordered by the Court. Since there is no case or controversy and no relief that can be ordered the Third Circuit should not have decided the case. *Honig v. Students of Cal. School For Blind*, 471 U.S. 148 (1985); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Oil Workers Unions v. Missouri*, 361 U.S. 363 (1960).

Even the Virgin Islands Code supports Petitioner's position. Section 36 provides that all PSC orders shall remain in full effect unless and until they are vacated by the lawful order of the District Court of the Virgin Islands. The District Court vacated the Order and Petitioner closed with no lawful order of the PSC prohibiting closing in effect. In essence, Petitioner's action in closing the purchase after the order was vacated had the same effect as if Petitioner had closed in December of 1986. No one would contend that PSC, having been notified in September of 1986, would have a right to rescind the transaction if it closed in December of 1986.

Petitioner fully expects that at some point in the future the issue of the PSC's jurisdiction over Petitioner will become an issue. However, the facts and circumstances of that controversy are not now known. The Third Circuit should not have anticipated a yet unknown case and controversy. *American Book Co. v. Kansas*, 193 U.S. 49, 51-52 (1904); *Alejandrino v. Quezan*, 271 U.S. 528, 535 (1926).

The Third Circuit's decision is in direct and apparent conflict with well established precedent established by the Supreme Court. Also, at the heart of this issue is the effect of Rule 62 of the Federal Rules of Civil Procedure and the legal effect of a "permanent" injunction.[17] In

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[17] Rule 62 provides the procedure to stay a party's actions during an appeal from a judgment granting, dissolving or

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Edgar v. Mite Corp., 457 U.S. 624 (1982), a bare majority of the Supreme Court refused to decide whether a preliminary injunction provided a complete defense to civil or criminal penalties. Justice Stevens acknowledged a preliminary injunction may be obtained upon "a mere probability of success on the merits." In this case, relying on a "permanent" injunction which was unstayed, Petitioner altered its position. Petitioner had no choice but to consummate the transaction since the contract including extensions had expired. ITT would not have waited the ten months necessary to obtain a decision from the Third Circuit. Nearly one hundred million dollars changed hands when this transaction was consummated. Now, the Third Circuit suggests that the transaction can be rescinded, causing losses of millions of dollars. If this is the law, future parties in Petitioner's position face a hobson's choice: (i) rely on a permanent injunction and close knowing a reversal on appeal can cost millions, or (ii) await the outcome of the appeal and lose the transaction because of the delay caused from the appeal.[18] A permanent injunction resulting from success on the merits which is unstayed should provide a complete defense to civil as well as criminal actions taken as a result of reliance on the unstayed judgment. A permanent

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denying an injunction. The Respondent's failure to avail itself of Rule 62 allowed the Petitioner to close the transaction, thus rendering the case moot. Had the Respondent properly followed the procedures set forth in Rule 62 the sale of Vitelco to Petitioner would be stayed and, arguably, a case and controversy would exist. The Respondent should not gain the benefit and protection provided in Rule 62 by failing to properly follow the clear language of that Rule.

[18] In such a case who would pay damages if the lower court judgment and grant of a permanent injunction is sustained but the party loses the transaction because of delays occasioned by the appeal.

injunction should either shift the burden to the enjoined party to obtain an immediate stay or accept the consequences action consistent with the permanent injunction. Clarity of this issue is of national importance.

IV.

APPLICATION OF THE PRE-AMENDMENT STATUTORY SCHEME TO THE OWNER'S SALE OF THE UTILITY'S STOCK IS INVALIDATED BY THE COMMERCE CLAUSE.

In *JDS Realty Corp. v. Government of the Virgin Islands*, 824 F.2d 256, 260 (3rd Cir., 1987), the Third Circuit concluded that the powers granted to Congress by the Commerce Clause of the United States Constitution are implicit in the territorial clause.[19] The Virgin Islands statutes as interpreted by the Third Circuit grant the PSC jurisdiction over the sale of utility's stock by its owner (i) without any standards of review; (ii) without any threshold requirement for jurisdiction; and (iii) without any procedural guarantees (no timetable, no notice requirements, no information requirements). In other words, the Virgin Islands statutes are deemed to give the PSC discretionary jurisdiction over the sale of any utility's stock with no criteria for its review allowing the PSC to make up the rules of the game as it is being played. Petitioner believes that this type of jurisdiction is in conflict with the Commerce Clause of the Constitution as interpreted by the Court in its decision of *Edgar v. Mite*, 457 U.S. 624 (1982).

This case is not one which involves matters of "corporate governance,"[20] therefore, *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970), applies the following tests:

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[19] The judgment was vacated and remanded on other grounds. 108 S.Ct. 687 (1988).

[20] In *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1649-51 (1987), the Court concluded the *Pike* Test does not apply to matters of Corporate Governance. *See also, Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir., 1988).

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to punitive local benefits." *Id.* at 142. *See also, Edgar v. Mite*, 457 U.S. 624, 643-46 (1982).

The sale of Vitelco's stock by ITT, a New York corporation, to Petitioner, clearly involved interstate commerce. The contract was negotiated and executed in New York City and even though closing took place in the Virgin Islands, the funds were transferred by a wire transfer from Hutton's account in New York City to ITT's account in New York City (the funds were never transferred to the Virgin Islands).

The burden imposed by the grant of jurisdiction is clearly excessive in relation to the local interest it purports to further. Vitelco is a privately owned utility. By devoting its property to public use Vitelco does not give up its right to manage its property. This rule has been best articulated by the Court in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276 (1923), where Justice McReynolds declared:

> "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company*, 291 Ill. 209, 234.
>
> > 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.' "

Id. at 289.

More recently, a decision based upon the First Amendment, reaffirmed that principle by holding that a commission could not order a utility to use its property,[21] billing envelopes, to promote an opposing viewpoint. *Pacific Gas & Electric v. P.U.C. of California*, 106 S.Ct. 903 (1986). In a footnote in his concurring opinion, Justice Marshall stated:

> "1. The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items 'belong' to the public, which has paid for them. However, a consumer who purchases food in a grocery store is 'paying' for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 2331, n. 1, 65 L.Ed.2d 319 (1980). The State could have concluded that the public interest would be best served by state ownership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills. . . ."

The Third Circuit extends the concept of regulation to the utility's owner over the most fundamental right of private property; the right to alienate property. All this with no standards or criteria, or with no guarantees as to procedural due process. For instance, the Petitioner was not notified of the first public meeting until some four

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[21] The Court stated that the Commissions "argument misperceives both the relevant property rights and nature of the State's First Amendment violation." *Id.* at 912.

months after the PSC was first notified of the sale and some five months after the Governor of the Virgin Islands was notified of the sale. When this transaction closed, ITT was under no binding obligation to close since the contract and all extensions had expired. Further, Petitioner had to pay over $1,000,000 in interest as a result of extensions it did receive. Public interest is limited to the services provided by the utility, rates charged by the utility for such services and the safe delivery by the utility of such services.

There is ample authority in the statutory scheme to protect the public legitimate interest without extending the PSC's jurisdiction to restrict or condition the sale of Vitelco's stock by ITT. Further, the possible loss of the franchise, a valuable property right, if Vitelco fails to deliver the service required under the franchise agreement, is a non-statutory inducement for Petitioner to insure that Vitelco will continue to provide modern telecommunication services. A statute granting jurisdiction and the freedom for the PSC to make rules as it goes is invalidated by the Commerce Clause under the principles of *Edgar v. Mite*, 457 U.S. 624 (1982).[22]

CONCLUSION

For the above reasons, this Petition for Certiorari should be granted. If the Petitioner is correct in urging that jurisdiction cannot be inferred from the pre-amendment statutory scheme or, if the inference of jurisdiction violates the Commerce Clause of the United States Constitution, then the judgment of the Third Circuit should be vacated and the case should be remanded to the Third Circuit for further proceedings regarding whether Act

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[22] Query, does the FCC approval of ATN's acquisition of the Vitelco stock from ITT raise a supremacy clause argument?

No. 5258 can be constitutionally applied to this case. If the Petitioner is correct in urging that this case was moot, the Court should vacate the Third Circuit's decision and dismiss the case as moot.

Respectfully Submitted,

ATLANTIC TELE-NETWORK CO.,
a Virgin Islands corporation,
Petitioner

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APPENDIX

Opinion of the Panel of the Court of Appeals for the Third Circuit

ATLANTIC TELE-NETWORK Co.,
a V.I. Corp.

v.

The PUBLIC SERVICES COMMISSION OF the VIRGIN ISLANDS, Patrick M. Rice, Executive Director of the Public Services Commission, Appellants.

No. 87-3485.

United States Court of Appeals,
Third Circuit.

Argued Dec. 9, 1987.

Decided March 10, 1988.

The purchaser of a telephone company's stock filed suit to challenge the imposition of conditions on the sale. The District Court for the District of the Virgin Islands, Almeric L. Christian, Chief Judge, held that the Virgin Islands Public Service Commission did not have the authority to impose conditions. Commission appealed. The Court of Appeals, Stapleton, Circuit Judge, held that the Commission's enabling statutes gave it the authority to regulate the sale of stock of the telephone company to assure the company's continued ability to provide adequate facilities and service of reasonable rates, even though, before the statutes were amended, they did not explicitly give the Commission the power to regulate the sale of a utility's stock.

Reversed and remanded.

Telecommunications

Virgin Islands Public Service Commission had authority to impose conditions on sale of telephone company's stock as means of assuring company's continued ability to provide adequate facilities and services at reasonable rates, even though Commission's enabling statutes, before amendment, did not explicitly give Commission power to regulate sale of stock. 30 V.I.C. §§ 1(a)(3), 2, 4, 39, 41.

Nicholas W. Fels, Paul J. Berman, Alan Tawshunsky, Covington Burling, Washington, D.C., Winston A. Hodge, Albert A. Sheen (argued), Winston A. Hodge, P.C., Christiansted, St. Croix, U.S. Virgin Islands, for appellee.

Maria Tankenson Hodge (argued), Maria Tankenson Hodge, P.C., St. Thomas, V.I., for appellants.

Before GIBBONS, Chief Judge, and STAPLETON and MANSMANN, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Atlantic Tele-Network Company (ATN) here challength the authority of the Public Service Commission of the Virgin Islands (PSC) to regulate the sale of the stock of the Virgin Islands Telephone Corporation (Vitelco) to ATN. The district court held that the PSC did not have authority to impose conditions on the sale under its original enabling statute and that the application to this sale of a statutory amendment explicitly granting such author-

ity would violate the Contract Clause. Because we find that the statute prior to its amendment gave the PSC the authority to impose the disputed conditions, we will reverse.

I.

Vitelco is the sole telephone company in the Virgin Islands. It was created in 1959 as a wholly owned subsidiary of the International Telephone and Telegraph Company (ITT) pursuant to an agreement between the Government of the Virgin Islands and ITT. The 1959 agreement prohibited the transfer of Vitelco's stock for a period of five years,[1] and required Vitelco to sign a franchise agreement that included a prohibition against transfer of the franchise without the consent of the PSC.

On January 9, 1987, ITT entered a Stock Purchase and Sale Agreement in which it agreed to sell all the shares of Vitelco's capital stock to ATN, a corporation that had been formed by a group of investors for the purpose of acquiring and controlling Vitelco.

The PSC of this agreement and attempted to exercise its regulatory authority over Vitelco by imposing conditions on the terms of the stock sale. The PSC held several hearings beginning in January, 1987, and entered sev-

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1. The provision stated:

> That, for a period of at least five (5) years from the date of such assignment, [ITT] will not relinquish majority stock control of [Vitelco], and [Vitelco], by its acceptance of the assignment of this agreement warrants that it will not, within the said five year period, sell its capital stock in such manner as to transfer stock control to any party other than [ITT].

App. at A-311 ¶ 1(d).

eral orders setting forth its conditions for approving the sale. ATN decided to participate voluntarily in all of the PSC proceedings and attempted to accommodate the PSC's concerns by modifying the agreement. ATN maintained throughout, however, that the PSC had no power to disapprove the sale or impose conditions.

On April 23, 1987, following the fourth hearing on the matter, the PSC issued the order contested in this case, No. 22-1987. In this order, the PSC concluded that certain terms of the sale relating to financing threatened the economic viability of Vitelco, and directed that the sale not be consummated unless certain conditions were satisfied. The primary difficulty identified by the PSC was that of a purchase price of approximately $98 million, ATN was to put up only $15.5 million in equity and borrow the remaining $82.5 million from its principal stockholder using the assets of Vitelco as collateral.

In order to insure that ATN would be able to pay its indebtedness to its principal stockholder, the agreement of sale called for the imposition of several restrictions on Vitelco. First, there was to be a "negative pledge of assets," under which Vitelco, for the duration of ATN's loan, would be foreclosed from pledging any of its assets to obtain additional capital, with the sole exception that Vitelco could execute purchase money mortgages in connection with purchases of new equipment. Second, for the duration of the loan, Vitelco was to take no action that would restrict Vitelco's ability to pay dividends to ATN. These restrictions led the PSC to conclude that

> inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its manda-

> tory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further, since the Vitelco stock is pledged as security for the debt, default would result in a chaotic situation for the utility.

App. at A-100. The PSC ordered that the sale not take place unless the negative pledge of assets and the restrictions on dividends were removed. The PSC also required that ATN's principal stockholder provide Vitelco with a $15 million irrevocable letter of credit, and stated several other conditions of its approval.

On May 18, 1987 the Virgin Islands legislature enacted Act No. 5258, which was signed into law the next day. This statute provides:

> No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the commission. Any such acquisition or control without prior authorization shall be void and of no effect.

Act No. 5258, § 1(a) (May 18, 1987) (to be codified at 30 V.I.C. § 43a), *reprinted in* App. at A-130.

Five days later, ATN filed a petition for reconsideration of the PSC's April 23rd order under 30 V.I.C. § 33 (1976). The PSC scheduled a hearing on this petition, but before the hearing could be held, ATN filed this suit in the District Court of the Virgin Islands on June 2, 1987. ATN

sought declaratory and injunctive relief against interference by the PSC with ATN's purchase of Vitelco's stock. The district court granted ATN's summary judgment motion. This appeal followed.

We have jurisdiction under 28 U.S.C. § 1291 (1982). Our review of the district court's determination regarding the PSC's authority to regulate the sale of Vitelco's stock is plenary.[2]

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2. After the district court's decision, the purchase of Vitelco's stock by ATN was consummated. ATN then moved to dismiss on the ground that the case is now moot. The relevant question in mootness analysis is whether in light of changed circumstances the court can afford meaningful relief. *See Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir.1985), *cert. denied*, 475 U.S. 1013, 106 S.Ct. 1190, 89 L.Ed.2d 305 (1986); *Natural Resources Defense Council, Inc. v. United States EPA*, 683 F.2d 752, 759 (3d Cir.1982) (relevant mootness analysis is whether the "court could order relief in this case which would cure an injury which would otherwise continue to exist").

In this case, the court can afford meaningful relief by reversing because the PSC would then have the authority to impose fines for a violation of its order and perhaps to seek rescission of the contract. *See* 30 V.I.C. § 39 (1976). Although the PSC could choose not to seek these remedies, its right to consider them in subsequent proceedings makes this controversy a live one.

This case is controlled by this court's decision in *Jersey Central Power & Light*. In that case, a utility company brought suit to declare unconstitutional a town's ordinance prohibiting the importation of nuclear waste into the town for the purpose of storage there. The district court declared the ordinance unconstitutional and enjoined its enforcement, and the town appealed. While the appeal was pending, the utility company placed nuclear waste in a storage facility in the town. The court of appeals held that the case was not moot on two separate grounds. First, the court noted that the district court's injunction allowed storage as well as im-

(Continued on following page)

II.

Vitelco is a public utility. 30 V.I.C. § 1(a)(3)(1976). As a public utility, Vitelco "is required [by the Public Utilities Act] to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable." 30 V.I.C. § 2 (1976).

Under the Act, the PSC has broad authority to regulate public utilities. In particular, the PSC has

> the power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this chapter, and with all other laws of the Virgin Islands applicable, and any ordinance or regulation relating to said public utility, and to conform to the duties upon it thereby imposed or by the provisions of its own charter, if any charter has or shall be granted it.

30 V.I.C. § 4 (1976). In addition to granting the PSC these explicit powers, the statute also states:

> The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise

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(Continued from previous page)

portation. The court then reasoned that, because the storage continued, if the court reversed the town could get an injunction requiring the removal of the nuclear waste. Second, the court noted that the town could impose fines on the utility company under the ordinance if the court reversed. *Jersey Central Power & Light* supports the PSC's position since, like the town in that case, the PSC could seek to impose fines or to rescind the sale if the judgment of the district court is reversed.

> in this chapter conferred on said Commission. *The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned, and indicated.*

30 V.I.C. § 41 (1976) (emphasis added).

Although no statutory provision enacted before the May, 1987 amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme. The PSC is charged with the responsibility of seeing that a utility meets its statutory obligation to provide adequate facilities and service at reasonable rates. In order to fulfill this responsibility, the PSC must have the authority to require a utility to maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future. In particular, if a sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such financial stability, it must be able to act effectively or its statutory mandate will go unfulfilled.

In Vitelco's case, the PSC in its April 23rd Order found that under the terms of the sale of Vitelco's stock to ATN, Vitelco is required to engage in conduct that will jeopardize its ability to provide adequate facilities and service at reasonable rates in the future. Once the PSC made such a finding, it had broad remedial powers to compel Vitelco to conform to its statutory duty. Although the district court held that the sale of Vitelco's stock on the proposed terms would not directly and immediately affect

rates and services, we do not believe the Virgin Islands legislature intended that the PSC would have to wait until disaster struck before taking remedial action.

ATN argues that the PSC's order attempts to regulate not Vitelco, but ATN and ITT, which are not public utilities. Although we agree that the PSC has no authority to regulate the conduct of ATN or ITT *per se,* we conclude that it clearly has the authority to regulate what they can extract from or impose upon Vitelco. If we were to accept ATN's position that the PSC has no authority with respect to the sale of Vitelco's stock, it would necessarily follow that the PSC is powerless to stop ATN from causing Vitelco to place securities in the market containing covenants with unreasonable restrictions on Vitelco's use of its assets. We conclude that the PSC's powers are not so constrained.

In addition, ATN contends that the five year prohibition on the transfer of control of Vitelco's stock contained in the 1959 agreement evidences the legislature's intent not to allow the PSC to interfere with any stock transfers after that time. Suffice it to say that we do not read that agreement as conferring upon ITT and unfettered right to sell Vitelco at the end of the five year period without regard to the effect of the transfer on Vitelco's ability to offer adequate telephone facilities and service at reasonable rates.

III.

We hold that the PSC had authority under the pre-amendment statute to impose conditions on the sale of Vitelco's stock as a means of assuring Vitelco's continuing

ability to provide adequate facilities and service at reasonable rates. In light of this holding, we need not decide whether the application of the statutory amendment to this sale would violate the Contract Clause.[3] We will reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

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3. In addition, given the fact that the PSC has not had an opportunity to take a position on the form its final order will take, we need not decide whether all aspects of the April 23 order fall within the authority of the PSC.

Transcript setting forth the opinion of the District Court Judge for the Federal District Court of the United States Virgin Islands

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST THOMAS & ST. JOHN

- o -

ATLANTIC TELE NETWORK COMPANY	)	
vs.	)	CASE NO. 87
VIRGIN ISLAND PUBLIC SERVICE COMMISSION	)	

REPORTER'S TRANSCRIPT
COURT'S OPINION

BEFORE: HONORABLE ALMERIC L. CHRISTIAN, Chief Judge

APPEARANCES: WINSTON HODGE, Esq.
MARIA T. HODGE, Esq.
DENISE FRANCOIS, Esq.

MICHAEL A. RODRIQUEZ,
Official Court Reporter
District Court
St. Thomas, Virgin Islands

(p. 2) (Thereupon, court was called to order at 11:02 a.m.)

The Court: Good morning.

Attorney Winston Hodge: Good morning.

Attorney Maria Hodge: Good morning.

The Court: The Court is ready to render its decision in the matter, which it took under advisement.

In the course of what I have to say, whenever I refer to the plaintiff, I mean Atlantic Tele-Network Company, I am referring to it simply as Atlantic. I will usually refer to the Public Services Commission as the PSC, the Virgin Islands Telephone Corporation, as Vitelco, and its parent corporation in which name—full name I do not know, I will refer to it as ITT.

When we first met to hear argument on this matter, I said at the outset that the question of exhaustion of remedies had been raised and had resolved that in favor of the plaintiff.

(p. 3) I am now saying, to state the reasons which prompted me in that direction, it was my conclusion then, and it is now, that the Court has jurisdiction to consider the legal issues presented in this matter and to do so without requiring that the plaintiff exhaust administrative remedies.

As we know the doctrine of exhaustion of remedies, it's a judge-made rule, and it does not bare upon subject matter jurisdiction. Susquehanna Valley Alliance v. Three Mile Island, 619 F. 2d 231, 245 (3d Cir. 1980) cert denied, 449 U.S. 1096 (1981).

In dictating this opinion from the bench, hereafter, I might omit the citation, and I will give it to the reporter, and he may put them in the record later. Some of the times I will mention the citations.

To go on then, moreover, as the Supreme Court noted in McKart versus United States, 395 U.S. 185 (1969), the exhaustion doctrine "is, like most judicial (p. 4) doctrines subject to numerous judicial exceptions." Id at 193.

Exhaustion of administrative remedies is unnecessary when there is no need for development of a factual record and the challenge raises the question of the constitutionality of the agencies enabling statute. And there are several citations in support of this: Susquehanna Valley Alliance, 169 F.2d at 244-44; see also Moore v. City of East Cleveland, 431 U.S. 494 (1977); Weinberger v. Safi, 422 U.S. 749 (1975).

In addition, judicial intervention prior to the final decision from an agency is permissible when the question is whether the agency acted in excess of its statutory authority. Leedom v. Kyne, 358 U.S. 184, 190-91 (1958).

Admittedly, judicial intervention is not warranted in every case in which an agency's jurisdiction is challenged.

Exhaustion is not required, however, where: (1), pursuit of the agency remedy will cause irreparable injury; and (p. 5) (2), when it seems clear that the agency lacks jurisdiction; and (3) where the agency's special expertise will be of no help on the question of its jurisdiction. Marshal v. Burlington Northern, Inc., 595 F.2d 513 (9th Cir. 1979); Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981); see al: 4 K. Davis, Administrative Law Treaties, section 26:5 (2d Ed. 1983).

It appears to this Court that all three of these factors have been satisfied for, in the first place, Atlantic is subject to high interest rates—high interest charges and

these continue to accrue and accumulate and will do so until this sale has been finalized.

Secondly, at this stage of these proceedings, it appears that the PSC pre-amended enabling statutes, 30 V.I.C. Section 1 et. seq., do not allow the commission to act beyond the regulation of rates charged and the regulation of services performed by public utilities. And (3), we do not consider the agency's expertise, on the parameters of its jurisdiction to be of (p. 6) much help in deciding this matter.

Thus, this court concludes that Atlantic need not have exhausted administrative remedies before the PSC and that this Court has jurisdiction to hear and determine the matter on the two issues presented [by counsel for Atlantic], and they are whether the PSC did, indeed, have jurisdiction to impose conditions on the sale of Vitelco prior to the May 19, 1987 amendment, Section 43(a) to the PSC's enabling statutes; and secondly, whether the amendment, which has taken form of Section 43, permits the PSC to impose such conditions.

I am going to focus next on the claim of impairment of contract.

Atlantic maintains that any application of Act No. 5258, the amendment in question, to the transaction between it and ITT violates the contract clause of the United States Constitution, Article I Section 10, clause one, as extended to this territory by the Bill of Rights by the Revised Organic Act of the Virgin Islands (p. 7) 48 U.S.C. Section 1561.

In response, the PSC contends that enactment of the statute was a valid exercise of this territory's police pow-

ers and may be properly applied to the sale of Vitelco stock.

At the outset, we note that for purpose of Contract Clause analysis, distinctions between contracts, which have been executed and those which remain executory are immaterial. Home Building and Loan Assocation v. Blaisdell, 290 U.S. 398, 429 n.8 (1934). Therefore, our discussion on this matter is unaffected by the fact that the sale of Vitelco stock has yet to be consummated.

Now, it is well settled that despite the absolute language of the Contract Clause, the prohibition against impairing the obligation of contracts is not to be read literally. Keystone Bituminous Coal Association v. De Benedicts, 107 S.Ct. 1232, 1251 (1987), citing W.B. Worthen Co. v. Thomas, 292 V.S. 426, 433 (1934).

Moreover, operation of (p. 8) the Contract Clause does not obliterate the inherent police power of the state. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 2 (1977). And in this case, whenever I use "state" we are using it with the understanding that this territory stands in the sted of the state.

Yet, the sovereign right of government to pass statutes for the promotion of the good of the public despite the impairment of an existing contractual relationship is not without limitation imposed by the Contract Clause. Allied Structural Steel Co., 438 U.S. at 242.

The Supreme Court has fashioned the following tests to aid in the determination of whether a challenged statute makes a rational accommodation between the state's police power and the Contract Clause.

Firstly, one must consider whether the newly enacted statute has substantially impaired a contractual relationship. See, e.g., Keystone Bituminous Coal, 107 S.Ct. at 1252; Energy Reserves Group, (p. 9) Inc. v. Kansas Power & Light, 459 U.S. 400, 411 (1983); Nieves v. Hess Oil Virgin Islands Corporation, Civ. No. 86-3049, slip op at 13 (3d Cir. May 22, 1987).

Secondly, if the law is found to constitute a substantial impairment, it must next be determined whether there is a "significant and legitimate public purpose behind the regulation . . ." See, e.g., Energy Reserves, 459 U.S. at 411-12, Nieves, slip op at 14; Troy, Ltd. v. Renna, 727 F.2d 287, 297 (3d Cir. 1984).

And thirdly, if the second inquiry is answered in the affirmative then, one must determine "whether the adjustment of the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." Nieves, slip op at 14. Citing Energy Reserves, 459 U.S. at 412.

If the state is not a party (or territory) is not a party to the contract, deference to legislative judgment (p. 10) regarding the "necessity and reasonableness of a particular measure" is warranted. Energy Reserves, 459 U.S. at 412-13. Deference, however, does not mean total acceptance of the judgment of the legislature without judicial scrutiny. Allied Structural Steel, 438 U.S. at 247.

With the foregoing precepts in mind then, let us examine the instant situation. Atlantic and ITT entered

into a purchase and sale agreement in January of the current year.

Although it is fair to say that the parties anticipated that the PSC might albeit unjustifiably interfere with the terms of the sale, it is clear from the record of the administrative proceedings that Atlantic intended to contest on appeal any order entered by the PSC which imposed conditions on the sale.

It is, therefore, clear that Atlantic, when contracting, did not expect imposition of the onerous conditions which the PSC has eventually laid down.

Consequently, we must (p. 11) conclude, and we do conclude that Act No. 5258 substantially impaired Atlantic's reasonable expectation to consummate this sale without undue interference from the PSC.

Moreover, as we view all the circumstances disclosed in the records, we discern no valid public purpose to the amendment, as Nieves tells us, "legislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the assorted public purposes." Nieves, slip op at 28. Passage of 43(a) was specifically aimed at obstructing the private contract between Atlantic and ITT. This enactment, therefore, can hardly be viewed as general legislation for the public welfare. Id. at 29-30.

For the foregoing reason, we conclude that the amendment to the enabling provisions of the PSC, as applied to the transaction before us, indeed, constitutes an unjustified impairment of Atlantic's legitimate rights and expectations.

(p. 12) In so saying then, it follows that if the conditions imposed by the PSC are to be upheld, it must be then on the basis of the law as it existed prior to the passage of Act No. 5258.

Now, it is axiomatic that absent legislative authority, an administrative agency is powerless to act. Louisiana Public Service Commission v. F.C.C., 105 S.Ct. 1890, 1901 (1986).

Hence, the PSC may not condition the sale of Vitelco stocks unless it has been granted the direct authority to do so. We cite here Pennsylvania Public Utilities Commission versus Philadelphia Electric Company, 460 A.2d 734 (Pa. 1983).

Title 30 of the Virgin Islands Code, Section 1 et seq., and the following sections impowered the PSC to regulate the rates charged and services provided by public utilities.

No where in these enabling provisions was the PSC authorized to approve or disapprove the sale of utility's stock by imposing conditions upon which a (p. 13) sale such as this may be consummated. This situation before us—excuse me, this situation is very much unlike that of the Pennsylvania's Public Utility Commission, which has been found to have had direct authorization under its enabling statute to disapprove, based on the electric company's "credit and prospects", a proposed issuance of securities to finance the completion of a nuclear power plant. Pennsylvania Public Utility Commission, 460 A.2d at 737-38. The relevant statute empowering that commission to register or reject securities, certificates, provided

specifically that in its determination in whether to register or reject the securities, the commission could "consider . . . [the utility's] credit and prospects, and other relevant matters." And to consider the utility credit and prospects and other relevant matters is a direct quote from the case. And the Court in that case quoted directly from Section 1903(a) of the Pennsylvania Public Utility's Codes.

In contrast to the Pennsylvania situation, the Virgin Islands (p. 14) Code did not authorize the PSC to approve their sale of a public utility far less allow it to consider the utility's future financial viability prior to such determination.

Moreover, Section 30 of the Virgin Islands Codes at Section 41 did not impower the PSC to regulate the sale.

Admittedly, Section 41 grants the PSC the authority to do all which is "necessary and proper" to carry out the powers enumerated in Title 30. But such "necessary and proper" clauses, simply augment existing powers; they do not confer independent authority to act.

Thus, Section 41 confers authority to do only what is necessary and proper to regulate rates and services. It does not extend or by implication allow or grant such powers to the PSC. The mere sale of Vitelco stock will not directly and immediately affect rates and services. The contract at issue contemplates no such change; if it had, the PSC might conceivably have authority to act but that is not the situation before us. See Preston County (p. 15) Light and Power Co. v. Renick, 113 S.E.2d 380, 389 (WVA 1960).

We, therefore, conclude that the PSC had no authority prior to the enactment of Act 5258 to impose condi-

tions upon the sale of VITELCO stock. The authority to impose pre-conditions flows from the power to deny altogether. Lacking the latter, the PSC was without jurisdiction to exercise the former I feel moved to make some further comments on the two issues raised and these comments are made in support of the conclusions finally reached.

Counsel for Atlantic argues that the Government of the Virgin Islands was a party to this contract. We do not agree with that. We do say, however, that the 1959 doings have a direct bearing. In 1959 a franchise agreement was executed. On the same day a purchase and sale agreement was executed; both as I have said on the same date, that date being October 30, 1959. Obviously, there must have been negotiations between the parties, ITT and the Government of the Virgin Islands. And we have the final (p. 16) outcome of such negotiations. The final outcome was that as to the franchise agreement there could be no transfer of the franchise. But, as to the purchase and sale agreements, the prohibition against transfer was limited to the five years next ensuing.

The reasonable inference to be drawn from this is not only that the PSC lacked the power prior to their May, 1987 amendments, but that its lack of power was specifically bargained for and intended. The five-year period, having expired, long expired by 1987, we are of the opinion that ITT had full right to sell to Atlantic as it so chose and that Atlantic bought what it bargained for. And, what it bought by that contract and is supposed to receive is whatever ITT had and one of the things that ITT had was the unfettered right to convey after five years.

And to do so without interference from the PSC and for that matter from anyone else.

Here let me digress to mention something. At the second hearing (p. 17) counsel for PSC presented to the Court as an exhibit or an attachment to their papers an opinion from the Attorney General from the Virgin Islands.

Subsequently, it is my understanding that a page eight was delivered, either to the clerk's office or to my law clerk's office, either the other or both, saying that page eight as submitted was not the correct page.

I have read the opinion of the Attorney General, but I have read it with the page eight originally submitted. I do not accept amendments to documents submitted to the Court once accepted by the Court by anyone handing a copy of a claimed corrected copy to anyone without the Court's permission. This requires a motion and an order. Since none was asked and none given, I have not read this second or this supposedly corrected page eight.

Anything I have said or anything I do say is based on the exhibit as submitted in court. I would like to make a few more comments on the matter of impairment (p. 18) of contract. The legislative record is replete with statements which reveal quite clearly what was the purpose of the proponent of this legislature and ultimately of the legislature in adopting it, and we find that purpose was to hinder, obstruct, delay, and, perhaps, even bar altogether.

We first look at the intricate legislative maneuvering with objections from senators. Incidentally, that was necessary to bring the bill on the floor. If you look at the

statements in the records of the proponent of the bill and the other senator who spoke in favor of the bill, the purpose becomes quite clear, and while I applaud the proponent for close working with the executive, the alacrity that the bill was approved—passed on the 18th, approved on the 19th, tends to say something to this Court.

One senator who incidentally voted against the amendment decried what he described as the "rushed to judgement" and that same senator, sensing what he deemed to be improper purpose and (p. 19) action, described the amendment as changing the rules in the ninth inning of the ball game. The other senator who spoke against the bill came closer in legal parlance and though, fearing constitutional impermissibility and he went on to describe the amendments as Ex Post Facto. He understood what was going on, even if he relied on the wrong constitutional prohibition. It is fair to say that the senators knew what they were about. Their own legislative counsel had advised them of the correctness of Atlantic's position in the matter, that the power sought to be exercised by the PSC was not there. Thus the senators felt they had to act and to act quickly before the matter reached "a judge" as the proponent more than once stated. I suppose the unspoken descriptive word of "a judge" or either "a meddling" judge or perhaps a "dumb judge". From the beginning, motive and purpose are made clear from the record. The first amendment proposed would have required not only the prior authorization of the PSC but, in addition, there to legislative (p. 20) ratification.

It seems, however, that wiser heads prevailed. And the legislative ratification was dropped. Moving the same senator who had spoken of Ex Post Facto to remark that

the earlier amendment was reinvesting authority back into the legislature and that so doing "would have meant sure trouble", this Act No. 5258 did more in my judgment than impair. Section 43(a) proclaimed the validly existing contract between the contracting party void and of no affect, not worth the paper on which it was written. The attempt to now hold such action in the peril of the nicety of Contract Clause analysis and to cover it with the cloak of police power of the Government in my view must necessarily fail.

In closing, I would make clear what has been today decided. Nothing here said speaks to the powers of the PSC to regulate once the same has been consummated, if it is consummated and whatever be the basis of such consummation. Nor is the amendment declared invalid. This court (p. 21) holds no more than that under existing law, as is obtained prior to the May 1987 amendment the PSC was not empowered to grant or withhold its approval to a sale of a public utility. Therefore, it could not lawfully impose conditions on such a sale. We hold also that act No. 5258 may not be applied to the contract with which we are concerned in this instant matter, for to do so, would be to run afoul of the Contract Clause of the Constitution of the United States, extended to this territory by the Revised Organic Act of the Virgin Islands.

That is the Court's opinion and decision. If the plaintiff will submit an appropriate form of judgment, the Court will review it and if it is in order sign it. Because the PSC is required to be vigilant and because it is better that they be overzealous than not so, the Court will not favorably entertain application for allowance of cost

or attorneys fees. Each side must bare their respective costs, including attorneys fees.

The Court: Very well.

(p. 22) Attorney Winston Hodge: If Your Honor, please.

The Court: Beg pardon?

Attorney Winston Hodge: With the Court's permission, the order can be submitted to counsel for PSC for review first?

The Court: Well, isn't that the customary practice?

Attorney Winston Hodge: Yes.

The Court: Yes, always follow the customary practice. Yes, because if the draft you prepare is not acceptable, then they will so state and then I will have both views.

Attorney Winston Hodge: Very well, sir.

The Court: Very well. Thank you.

(Thereupon, court adjourned at 11:45 a.m.).

(p. 23) CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the District Court of the Virgin Islands, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the trial in the case of ATLANTIC TELE NETWORK COMPANY VS. VIRGIN ISLAND PUBLIC SERVICE COMMISSIONER.

I further certify that I was authorized and did report by stenotype the proceedings and evidenced in said trial,

and that the foregoing pages numbered 1 to 23 inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF I have hereto subscribed my name this 24th day of June, 1987.

/s/ Michael A. Rodriquez
MICHAEL A. RODRIQUEZ
Official Court Reporter

Order of the Federal District Court

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ATLANTIC TELE-NETWORK CO., a Virgin Islands Corporation, Plaintiff, vs. THE PUBLIC SERVICES COMMISSION OF THE VIRGIN ISLANDS and PATRICK M. RICE, Executive Director of the Public Services Commission, Defendants.	CIVIL NO. 1987-257 ACTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

JUDGMENT OF THE COURT

This matter came on for hearing on the Plaintiff's motion for summary judgment on its complaint for declaratory relief. The Court considered the evidence and memoranda of law submitted by the parties, and having given due consideration to the oral arguments of counsels of the respective parties, and the Court having rendered its oral opinion,

IT IS HEREBY ADJUDGED, DECREED and DECLARED that:

1. The Defendant Virgin Islands Public Services Commission, prior to May 19, 1987, was not empowered to grant

or withhold approval of the sale of the stock of the Virgin Islands Telephone Corporation to Plaintiff Atlantic Tele-Network Co., nor could it impose any conditions on such a sale;

2. Act No. 5258 of the Legislature of the Virgin Islands constitutes a substantial and unjustified impairment of Plaintiff Atlantic Tele-Network Co.'s legitimate rights and expectations and may not be constitutionally applied to the Plaintiff's contract to purchase the stock of the Virgin Islands Telephone Corporation;

3. Therefore, the Virgin Islands Public Services Commission is permanently enjoined from granting or withholding its approval of the sale of the stock of the Virgin Islands Telephone Corporation to Plaintiff, and from imposing any conditions on such sale.

DONE THIS 7th DAY OF JULY, 1987.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
CHIEF JUDGE

ATTEST:

ORINN ARNOLD
CLERK OF THE COURT

By: /s/ Frank Blackman
Deputy Clerk

Order of the Court of Appeals for the Third Circuit Denying the Request for Rehearing

SALLY MRVOS
Clerk

Telephone
xxxxx

Office of the Clerk

UNITED STATES COURT OF APPEALS
For the Third Circuit
21400 United States Courthouse
INDEPENDENCE MALL WEST
601 Market Street
PHILADELPHIA 19106 - 1790

July 18, 1988

Re: Atlantic Tele-Network Co., etc. v. The Public Services Commission, etc. Appellants

No. 87-3485

Dear Counsel:

Enclosed herewith is conformed copy of order filed by the Court today in the above-entitled case.

Very truly yours,
Sally Mrvos, Clerk

/s/ By: Betty J. Robinson
Betty J. Robinson
Deputy Clerk

sma
Enc.
Copies to All Parties

DIRECT DIAL
597-3155

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3485

ATLANTIC TELE-NETWORK CO.,
a V.I. Corp.

vs.

THE PUBLIC SERVICES COMMISSION
OF THE VIRGIN ISLANDS,
PATRICIA M. RICE, Executive Director
of the Public Services Commission,

Appellants

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Walter Stapleton
Circuit Judge

Dated: July 18, 1988

PSC Order No. 22—1987, Conditioning the Sale of Vitelco Stock from ITT to ATN

PUBLIC SERVICES COMMISSION
P.O. Box 40
Charlotte Amalie, St. Thomas, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE	)	PSC DOCKET
SALE OF STOCK OF THE	)	NO. 301
VIRGIN ISLANDS	)	
TELEPHONE CORPORATION	)	ORDER
	)	NO. 22-1987

The above captioned matter came on for hearing before the Virgin Islands Public Services Commission (hereinafter "Commission") on April 21, 1987, Atlantic Tele Network Company (hereinafter "ATN") being present and represented by its counsel, Winston A. Hodge, Esq., and its principals who are now identified to be Jeffrey Prosser, Cornelius Prior, and E. F. Hutton & Co., Inc., the latter represented by Warren Idsal and Gerald Gminski; also present was the former principal Edward Blankenau, as well as ITT, represented by its counsel, Derrick W. Samuelson, and the Virgin Islands Telephone Corporation (hereinafter "Vitelco") represented by its president, Jack Basford, and its counsel, Samuel Sugden; and the Commission having heard the recommendations and testimony of its staff, and having heard the testimony and argument of ATN and being otherwise duly satisfied in the premises, hereby makes the following findings and conclusions:

1. Following submission to the Commission of the proposed terms of acquisition of all of the stock of Vitelco

by ATN from ITT, certain changes in the ownership of ATN were negotiated and consummated, as a result of which Edmund Blankenau, Craig Swoboda and Mid American Communications Corporation will no longer be shareholders in ATN and will be replaced by Cornelius Prior and E. F. Hutton. The new ownership of ATN will be distributed 27.5% to Jeffrey Prosser, 27.5% to Cornelius Prior, and 45% to E. F. Hutton.

2. In addition to the change in ownership in ATN, the financial terms of the acquisition have been substantially revised. The total cost of the acquisition, which was to be approximately $89 million under the original ATN proposal, will be approximately $98 million under the new proposal. The original proposal involved an equity investment of approximately $14 million, and $75 million in debt to be obtained from First Chicago, with a repayment term of approximately eight (8) years, principal payments to begin in approximately four and one-half (4½) years, all of the foregoing to bear interest at approximately nine (9) percent. It was also agreed on the part of ATN, and stipulated before this Commission on February 21, 1987, that ATN would obtain a letter of credit in the amount of $15 million which was to be irrevocable and which was to serve as a source of additional equity, if needed, in order to cure any default in its loan agreement or in order to supply capital to comply with any lawful order of the Commission. Funds drawn on the letter of credit by ATN would be contributed to Vitelco as additional equity. At the time of the same meeting at which the commitment to secure a letter of credit was made, ATN also agreed to negotiate changes in the terms

of their loan agreements with First Chicago to delete unacceptable covenants which would have had a direct negative impact on Vitelco, either as to its ability to borrow or to make capital investments. All of those objections are more fully stated in the report of the Staff submitted in connection with the transaction as then proposed, and which the Commission, at the time of its order of February 5, 1987, adopted and found persuasive.

3. Under the new transaction, the loan from First Chicago Bank is no longer required. Instead, ATN would secure a "bridge loan" from E. F. Hutton in the amount of $82.5 million, and Hutton would purchase preferred stock from ATN in the amount of $12.5 million. Hutton is to contribute $2 million in common equity, and the other shareholders of ATN a total of $1 million. It is also contemplated that the bridge loan would be converted to a longterm permanent loan in the form of debentures having fifteen (15) year maturities, with repayment of the principal to begin in the eighth year and to be outstanding for approximately eleven and one-half (11½) years, on average, and to bear interest at the rate of eleven (11) percent per annum.

4. While the negative covenants of the First Chicago loan, applicable to or directly affecting Vitelco, have been removed from this proposed method of financing, certain substantial encumbrances upon Vitelco remain. These include what is described by the witnesses as a negative pledge of Vitelco assets to be imposed by ATN, as the stockholder of Vitelco, upon the utility for the duration of the senior debentures. As described by the witnesses, this negative pledge would mean that none of Vitelco's exist-

ing assets could be used as collateral for any loan taken by Vitelco itself. Only new purchases of equipment, which might be accomplished by a purchase money mortgage not to exceed 75% of the total purchase price of the equipment, would be allowed.[1] The Commission doubts that there are many lenders in the Virgin Islands who would be prepared to finance telephone equipment under such an arrangement, given that foreclosure upon, for example, used telephone wire, would not appeal to a lender. We adopt the summary and testimony of Mr. Madan in respect to the negative pledge and conclude that it represents a severe and direct limitation on Vitelco's ability to secure debt in the future which cannot be accepted.

5. In addition, the new financing would impose, for the duration of the senior debentures, an obligation directly on Vitelco to "take no action which would restrict its ability to pay dividends" to ATN. This unusual restriction, more fully described in the testimony of our consultant, Mr. Madan, in the Commission's view, represents an unwarranted reduction in the financial flexibility and discretion of Vitelco, solely for the benefit of the stock purchasers and to insure that they will draw sufficient earnings from Vitelco to pay the massive debt being undertaken to acquire the stock. We conclude that this represents a detriment to Vitelco and its rate payers, with no corresponding benefit to them, and cannot be justified.

6. We are also concerned that the proposal involves the use of a holding company, but that the stockholders re-

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[1]An existing line of credit Vitelco presently holds to a maximum of $5 million would be unaffected.

fuse to give assurances that the holding company will not involve itself in unrelated ventures, relying upon Vitelco's credit worthiness or its operations or officers for the benefit of an unrelated venture. We conclude that such a risk is substantial and that it poses a distinct danger to Vitelco and its rate payers of misuse of their assets or the value thereof.

7. We are also concerned that the newly revised transaction involves massive fees to be paid, not only to the withdrawing shareholders, but to the lenders who will also be owners, which we cannot find justified, particularly when the method to pay these fees appears to be to add their amount to the debt which is to be satisfied by ATN through its only source of income, namely withdrawal of profits from Vitelco. We conclude that Vitelco should not be obligated through any disbursement of profits, dividends, or otherwise, to pay the costs of these fees to affiliates and interested parties, more fully described in the testimony of our consultant, Mr. Madan, beginning at page 19 of his testimony and reflected further in his schedules. We conclude that if such fees are to be paid, they should be the obligation solely of the shareholders of ATN, and not a part of the debt to be financed through withdrawals from Vitelco.

8. We are also disturbed that officers and attorneys representing themselves to be appropriate officials of ATN made commitments to this Commission, more fully set forth in the transcript of the hearing of February 21 and the order of February 25, which the present stockholders choose, in some respects, to disregard. Particularly noticeable is their unwillingness to adhere to the

commitment made directly to this Commission by Mr. Swoboda, identifying himself as a shareholder and attorney for ATN, to secure a letter of credit in the form previously described. It is the position of the Commission that representations of this sort, made by an official of a firm appearing before the Commission, are binding and must be performed.

9. We note also the continued reflection in some documents submitted to the Commission's staff of indications that on-going advisory fees, previously paid to ITT and even then subject to Commission concern, may be intended for payment either to E. F. Hutton or to other principals. Similarly, employment contracts for the principals have been mentioned. The Commission wishes to make clear that any such fees or employment contracts with interested parties or affiliates of Vitelco *will be subject to careful scrutiny to insure that they are arms length and given only for full and reasonable value.*

10. Finally, and of great importance, we credit the careful financial analysis of our staff consultant, Mr. Madan, which is set forth in the schedules to his testimony and strongly indicates an untenable financing burden on Vitelco. His analysis clearly shows that inasmuch as Vitelco will be ATN's sole source of repayment of its $80 million debt, as well as its mandatory 12% annual dividend to preferred shareholders, there will be an unavoidable financial harm to Vitelco, including an immediate negative effect on retained earnings, and a negative cash flow by 1994, with a consequent upsurge in pressure to sacrifice reasonable capital investment requirements and prudent maintenance and operation expense obligations. Further,

since the Vitelco stock is pledged is pledged as security for the debt, default would result in a chaotic situation for the utility.

Only a letter of credit of the type ATN had previously agreed to supply could reasonably protect Vitelco and its rate payers from unreasonable harm and detriment, both to rates and to services.

On the basis of the foregoing findings and conclusions, it is hereby

ORDERED effective forthwith that Vitelco shall not suffer or permit any officer, official, agent or shareholder of Vitelco to impose upon its assets any pledge or negative pledge for any purpose not directly related to the normal borrowing of Vitelco itself for normal and bona fide utility purposes, without the prior consent of this Commission; and it is further

ORDERED that Vitelco, shall not suffer or permit anyone, including without limitation, any of its officers, agents, principals or shareholders, to impose upon it any policy, directive or requirement to disburse divdends or to refrain from actions which may be deemed to impair the utility's ability to pay dividends, without the prior consent of this Commission; and it is further

ORDERED that any proposed sale of Vitelco stock by ITT to ATN, or to any other prospective purchaser, which includes any of the following terms or conditions, shall not be consummated and is hereby prohibited: (a) No such sale shall provide for the use of a holding company structure except in conjunction with an express prohibi-

tion upon the holding company's participation in any venture other than the ownership and operation of Vitelco, which does or may rely in any way upon the credit or value of Vitelco as an asset of the holding company, or upon the shared services of Vitelco officers or employees, equipment or other assets, or which imposes any lien or obligation upon Vitelco, its operations, funding or assets, without the prior approval of this Commission; (b) *There shall be no sale of Vitelco stock to ATN upon the terms proposed in the documents submitted to this Commission, unless there is also submitted an irrevocable letter of credit, or fully equivalent financial guarantee on the part of E. F. Hutton in the sum of $15 million which fully complies with the requirements of PSC Order No. 7-1987, paragraph 1(c);* (c) There shall be no sale of Vitelco stock to ATN under which fees payable to purchase the option of withdrawing stockholders, or for financial advisory fees, bridge financing commitment fees, associated fees for longterm debt or preferred stock, or comparable purposes, are to be financed by debt instruments of ATN. Any such fees shall be paid by ATN from a non-debt source; and (d) Any and all representations to this Commission, made by officers, principals or attorneys of ATN, at any time, shall be and hereby are deemed binding upon ATN, notwithstanding changes in ownership subsequent to such representations; and it is further

ORDERED that in connection with any transfer of ownership of Vitelco stock by ITT to any other entity, any advisory fees which are proposed to be paid by Vitelco to such stockholder shall be subject to the prior scrutiny of this Commission to insure that they are made only for

reasonable value and are negotiated at arms length; and it is further.

ORDERED that any employment contracts entered into by Vitelco and any shareholder of Vitelco or any shareholder of ATN, should ATN become the owner of Vitelco, shall be entered into only upon reasonable terms and conditions for value and at arms length and shall be subject to review of this Commission.

Providing all the terms of this order are met by ATN, ITT and by Vitelco, and compliance with the terms hereof are certified in writing to the Commission and confirmed by the Commission's staff, the proposed sale of stock by ITT to ATN may proceed.

For the Commission,

/s/ Alphonse Adams
Alphonse Adams, Chairman

DATED: April 23, 1987

CC: Atlantic Tele Network Co., c/o Winston Hodge, Esq.
ITT, c/o Derrick W. Samuelson, Esq.
Vitelco, c/o Jack Basford

Applicable Statutes of Virgin Islands Code

Chapter 1. Public Utilities Generally

Subchapter I. Public Utilities

Section Analysis

1. Public utilities subject to regulation; definition; financial interests of members of Commission
2. Just and reasonable rates and services
3. Joint use of facilities
4. Compliance with regulations
5. Uniform accounts
6. Form of accounts prescribed by Commission
7. Office in Virgin Islands
8. Reports to Commission
9. Schedule of rates
9a. Interest on customer deposits
10. Filing of rules
11. Publication of schedules
12. Filing and publication of joint rates
13. Changes in rates
14. Filing of new schedules
15. Schedules binding
16. Inspection of records
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18. Appointment of agents

19. Answer to inquiries

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21. Notice to utility of complaint

22. Notice to utility of hearing

23. Power of Commission to fix rates and services

24. Suspension of rates

25. Expenses of investigation

26. Complaints by utilities

27. Power to administer oaths

28. Depositions

29. Records of proceedings

30. Transcript as evidence

31. Compliance with Commission rate orders

32. Changes of Commission orders

33. Petitions for reconsideration

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35. Questions on appeal

36. Orders to remain in effect

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38. Penalty for refusal to supply information

39. Penalty for violations

40. Separate offenses

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42. Existing franchises

43. New franchises

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History

§ 1. Public utilities subject to regulation; definition; financial interests of members of Commission

(a) The following services provided by an individual, firm, co-partnership, association, corporation or other person for compensation are declared to be affected with a public interest and are defined to be a public utility subject to this chapter, and the person providing such service to be a "public utility".

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T.30 § 1

(1) lighterage and cargo handling;

(2) dockage, wharfage, or related cargo services;

(3) telephone service;

(4) water supply services; except retail deliveries;

(5) electric power service;

(6) passenger services by motor busses or trucks.

(7) public marine passenger transportation services operating under government grant of exclusive franchise.

* * *

(b) None of the foregoing services shall be deemed to be a public utility under this chapter, when supplied by the Federal Government.

(c) The rates for public utility service supplied by the Government shall be fixed, unless fixed by law, in the same manner as rates for public utility services furnished by a private entity.

(d) As used herein, the word "Commission" shall mean the Public Services Commission of the Virgin Islands as continued and established by the provisions of section 137 of Title 3.

(e) No member of the Commission shall have any financial interest in, or be an agent or employee of, or any public utility subject to this chapter.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181; amended May 22, 1970, No. 2722, § 2, Sess. L. 1970, p. 122; July 11, 1973, No. 3460, § 2, Sess. L. 1973, p. 165. Amended Nov. 18, 1976, No. 3906, § 11, Sess. L. 1976, p. 228.

§ 2. Just and reasonable rates and services

Every public utility doing business within the Virgin Islands is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished, or rendered, shall be reasonable, just and nondiscriminatory. Every unjust or unreasonable or dis-

criminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the Commission.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 16. Inspection of records

The Commission or any member thereof or any person or persons employed by the Commission for that purpose shall, upon demand, have the right to inspect the books, accounts, papers, records, and memoranda of any public utility, and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business and affairs. Any person other than one of said members who shall make such demand shall produce his authority to make such inspection or examination.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 17. Subpoena of records

(a) The Commission may require, by order or subpoena, to be served upon any public utility in the same manner that a summons is served in a civil action in the District Court of the Virgin Islands, the production within the Virgin Islands at such time and place as it may designate of any books, accounts, papers, or records kept by such public utility in any office or place without the Virgin Islands, or verified copies in lieu thereof if the Commission shall so order, in order that an examination thereof may be made by the Commission under its direction.

(b) Attendance of witnesses and the production of such documentary evidence may be required from any place in the United States. In case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission may invoke the aid of any court of the United States or the District Court of the Virgin Islands in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section. The said Commission is hereby given power to call on the Attorney General of the Virgin Islands to enforce the provisions of this chapter in the proper courts and in the District Court of the Virgin Islands.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 20. Investigations of rates and services

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the Commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the Commission without a formal hearing.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 23. Power of Commission to fix rates and services

(a) If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this chapter, the Commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, charges, or schedules as shall be just and reasonable. If upon such investigation, it shall be found that any regulation, time schedule, act, or service, complained of is unjust, unreasonable, unsafe, inadequate, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this chapter, or if it be found that reasonable service is not supplied, the Commission shall have power to determine and substitute therefor such other regulations, time schedule, service, or acts and to make such orders respecting any such changes in such regulations, time schedules, service, or acts as shall be just and reasonable. The Commission shall have power to fix, determine and require such extensions, expansions, or increases in facilities or service as the Commission finds are in the furtherance of the public convenience and necessity, and the terms and conditions upon which the same shall be made: Provided, That no hearing shall be had and no order shall be made with respect thereto without notice to the public utility affected thereby, as provided in section 22 of this title.

(b) In exercising its authority to prescribe just and reasonable rates, the Commission shall provide a return of not less than six (6) nor more than eight (8) percent on the net investment in the property prudently acquired for and

devoted to the public use, unless the Commission makes a special finding that a different return is imperative, so as to be fair to the consumer interest, and to be fair to the investor interest by providing a return commensurate with returns in other enterprises having corresponding risks, and which will assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 36. Orders to remain in effect

All orders and decisions of the Commission shall remain in full effect, except as provided in section 33 of this title, unless and until they are suspended or rescinded by the Commission or are vacated by lawful order of the District Court of the Virgin Islands: Provided, That if in any petition made to the said court appealing from an order or decision of the Commission it be alleged that substantial and irreparable financial or property loss would be occasioned to the petitioner by the operation of the said order pending the determination of the said appeal, the court shall set a time and place for hearing upon the said allegation after not less than three days' notice to the Commission (during which period the execution of the order or decision shall be stayed), and the said court may then, upon a clear showing of irreparable and substantial financial or property loss as alleged, suspend the effective date of the said order. No such suspension shall be for a greater period than sixty days without further order after notice or hearing by the court. In the event of the issuance of an order suspending the operation of any order of

the Commission, the court may include therein such provision as it deems advisable for the preservation of records or accounts and the impounding or otherwise securing of moneys necessary to give effect to the order of the Commission in the event the said order is sustained.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

* * *

§ 38. Penalty for refusal to supply information

Any officer, agent, or employee of any public utility who shall fail or refuse to fill out and return any blanks, as required by this chapter, or shall fail or refuse to answer any question therein propounded, or shall knowingly or wilfully give a false answer to any such question, or shall evade the answer to any such question where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or refuse to exhibit to the Commission or any member thereof, or any person authorized to examine the same, any book, paper, account, record, or memoranda of such public utility which is in his possession or under his control, or who shall fail to properly use and keep his system of accounting, or any part thereof as prescribed by the Commission under this chapter, or who shall refuse to do any act or thing in connection with such system of accounting when so directed by the Commission or its authorized representative shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000 for each offense, and when such officer, agent, or employee acted in disobedience[1] to the direction, construction,[1] or request of

[1]So in original.

the public utility involved, said public utility in addition, shall pay a penalty of not more than $2,0000 for each offense.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 39. Penalty for violations

(a) If any public utility shall violate any provision of this chapter, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, or shall fail, neglect, or refuse to obey any lawful subpoena, requirement or order made by the Commission, or any judgment or decree made by any court upon its application, for every such violation, failure, or refusal, such public utility shall forfeit and pay to the Government of the Virgin Islands the sum of $100 for each such offense. In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any public utility acting within the scope of his employment and instructions shall in every case be deemed to be the act, omission, or failure of such public utility.

(b) The Attorney General of the Virgin Islands, at the request of the Public Utilities Commission, or its designated agent therefor, shall forthwith bring appropriate action to compel adherence to, or enjoin violations of, any lawful orders of the Commission issued pursuant to this chapter, and to recover in the name of the Government of the Virgin Islands the penalties herein provided, and the Court shall give priority to any such actions.

(c) The provisions of this section shall not apply to departments or agencies of the Government of the Virgin Islands furnishing public utility services, however, this provision shall not exempt the Government of the Virgin

Islands from claims made pursuant to Title 3, chapter 118 of the Code.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181; amended July 11, 1973, No. 3460, § 4, Sess. L. 1973, p. 165.

Amendments—1973. Subsection (c): Added.

* * *

§ 41. Liberal interpretation

The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the Commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said Commission. The Commission hereby created shall have, in addition to the powers in this chapter specified, mentioned, and indicated all additional, implied, and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned, and indicated. A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts, and regulations of the Commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

§ 42. Existing franchises

Nothing in this chapter shall be construed to alter or amend the terms of any contracts or franchises governing the provisions of public utility services, issued or entered into priority to January 1, 1965.—Added April 21, 1965, No. 1435, Sess. L. 1965, Pt. I, p. 181.

Act No. 5258, Amending the V.I.C. Granting Jurisdiction to the PSC, Effective May 19, 1987

ACT NO. 5258

BILL NO. 17-0046

SEVENTEENTH LEGISLATURE OF THE
VIRGIN ISLANDS OF THE UNTED STATES
Regular Session
1987

To require the approval of the Public Service Commission for the acquisition or control of public utilities

———o———

BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. Title 30, Chapter 1, Virgin Islands Code, is amended by adding a new Section 43a to read as follows:

"Section 43a. *Acquisition or control of Public Utility: approval of Commission*

(a) No person or corporation, whether or not organized under the laws of the Territory, shall sell, acquire or transfer control, either directly, or indirectly of any public utility organized and doing business in this territory, without first securing authorization from the commission. Any such acquisition or control without prior authorization shall be void and of no effect.

(b) No public utility incorporated under the laws of this Territory shall sell, nor shall any such public utility make or permit to be made upon its books any transfer of any share or shares of its capital stock, unless authorized to do so by the commission. Nor shall any public utility incorporated under the laws of this Territory sell any share or shares of its capital stock or make or permit any transfer to be made upon its books, to any corpora-

tion, domestic or foreign, or any person, the result of which sale or transfer in itself or in connection with other previous sales or transfers shall be to vest in such corporation or person a majority in interest of the outstanding capital stock of such public utility corporation unless authorized by the commission.

(c) Where, by the proposed transfer of control, sale, assignment, contract, or agreement for assignment or transfer of capital stock, as set forth in this Section, it appears that a public utility or a wholly owned subsidiary of a public utility may be unable to fulfill its obligation to any employee with respect to pension benefits previously enjoyed, whether vested or contingent, the commission shall not grant its authorization unless the public utility, and/or the prospective stockholders thereof, seeking the commission's authorization, assume such responsibility and provide such assurance as will be sufficient to insure that all such obligations to employees will be satisfied as they become due.

Thus passed by the Legislature of the Virgin Islands on May 18, 1987.

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 18th day of May, A.D., 1987.

/s/ Iver A. Stridiron
IVER A. STRIDIRON
President

/s/ Virdin C. Brown
VIRDIN C. BROWN
Legislative Secretary

(SEAL)

The above bill is hereby approved.

Witness my hand and the Seal of the Government of the Virgin Islands of the United States at Charlotte Amalie, St. Thomas, this 19th day of May, A.D., 1987.

/s/ Alexander A. Farrelly
Alexander A. Farrelly
Governor

(SEAL)

Excerpt from the Transcript of PSC Proceedings on April 21, 1987, Dealing with the Adoption of PSC Order No. 22-1987

V.I. PUBLIC SERVICES COMMISSION
P.O. BOX 40
ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE SALE OF VIRGIN ISLANDS TELEPHONE CORPORATION STOCK TO ATLANTIC TELE-NETWORK COMPANY	)))))	DOCKET NO. 301

Transcript of Proceedings of Executive Session
April 21, 1987
Commenced at 10:40 a.m.

Held in the Assembly
Hall, Bluebeard's Castle
St. Thomas, V.I.

BEFORE COMMISSION MEMBERS PRESENT:

ALPHONSE ADAMS, Chairman

GEORGE C. PARROTT, Vice-Chairman

ALFRED B. HAYES, Commissioner

VALDEMAR A. HILL, JR., Commissioner

HECTOR L. RIVERA, Commissioner

SEN. HOLLAND L. REDFIELD II, Commissioner, Ex-officio

SEN. ALLAN PAUL SHATKIN, Commissioner, Ex-officio

PATRICK M. RICE, Executive Director

APPEARANCES:

FOR PSC:

MARIA T. HODGE, ESQ., Counsel for PSC
JAMSHED K. MADAN, Consultant for PSC

For Vitelco:

SAMUEL SUGDEN, ESQ., Counsel for Vitelco
DERRICK SAMUELSON, ESQ., Counsel for ITT
JACK W. BASFORD, President for Vitelco

* * *

(p. 259) The Chairman: Any comments from any of the commissioners?

Mr. Hayes: I would make a motion that an order be forthcoming from the Commission to encompass the points made by counsel and staff.

The Chairman: At this point, I think best interest would be served if the Commission goes in Executive Session as provided by the Sun Shine Law of the Virgin Islands.

So, I would request that the inner portion here be left to the members of the Commission and the staff and that the outer portion be utilized by all others.

[Hearing recessed]

[Executive Session]

Public Hearing resumes 9:00 p.m.

The Chairman: We are ready to resume the hearing.

The Commission has closed its Executive Session and is now back in regular session.

We will have a motion made with respect to the position taken by the Commission in Executive Session.

Mr. Hayes: I would make a motion, Mr. Chairman, that the Commission issue an order or orders to Vitelco or Atlantic, ATN, or both of them to encompass the points that counsel and staff have (p. 260) recommended to the Commission. This would be issued as soon as possible.

The Chairman: Second the motion?

Mr. Rivera: I second the motion.

The Chairman: Discussion on the motion?

We'll proceed to vote on the motion by call of names. Commissioner Parrott.

Mr. Parrott: In favor.

The Chairman: Commissioner Hayes.

Mr. Hayes: Aye.

The Chairman: Commissioner Hill.

Mr. Hill: Yea.

The Chairman: Commissioner Rivera.

Mr. Rivera: Yes.

The Chairman: My vote is also yea.

So it's unanimous that we support the position taken by our counsel and staff.

The Commission will have two orders or an order of two orders prepared by our counsel that will reflect the issues and decisions made by the Commission.

Atty. M. Hodge: Very well. Mr. Chairman, I will be glad to prepare the order and submit it to you.

Atty. W. Hodge: May re enquire as to when that will be done.

(p. 261) Atty. M. Hodges: I'll try my best tomorrow.

The Chairman: I think that completes action for this long day and it is 9:00 now.

The hearing on Docket 301 is closed as of this time, subject, of course, to the preparation of the orders.

So, we would like to thank all the participants and all who were here at the hearing.

[Concluded 9:05 p.m.]

[Certified to be a true recording and transcription of the foregoing matter, pages 1-261]

/s/ Dolores T. Stephen-Rivas
DOLORES T. STEPHEN-RIVAS

PSC Order No. 25-1987 Moving May 22, 1987, PSC Meeting to June 9, 1987

PUBLIC SERVICES COMMISSION
P.O. BOX 40
CHARLOTTE AMALIE, ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE SALE OF STOCK OF THE VIRGIN ISLANDS TELEPHONE CORPORATION	)	PSC DOCKET NO. 301
	)	ORDER NO. 25-1987

WHEREAS the Virgin Islands Public Services Commission, by Order No. 24-1987, had scheduled a hearing on this matter for May 22, 1987, provided that all interested parties elected to waive the ten day notice requirement; and

WHEREAS Atlantic Tele-Network Co. declined to waive the ten day notice requirement, and accordingly an adjourned hearing date is necessary to comply with Atlantic Tele-Network Co.'s right to ten days notice of such a hearing, and the Commission being duly satisfied in the premises, it is hereby

ORDERED that the hearing in this matter previously scheduled for May 22, 1987, shall be and the same is hereby rescheduled to the 9th day of June, 1987, at 10:00 AM at Bluebeards Castle Hotel, and all interested parties are hereby notified to appear at the place and time for further proceedings in this matter.

For the Commission,

/s/ Alphonse Adams
Alphonse Adams, Chairman

Dated: May 22, 1987

cc: Atlantic Tele-Network Co., c/o Winston Hodge, Esq.
ITT, c/o Derrick W. Samuelson, Esq.
VITELCO, c/o Jack Basford.

Swoboda Statement—A Comparison of the PSC's Chief Counsel's Statements in Her Brief to the Third Circuit to the Actual Statement of Swoboda

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal No. 87-3485

ATLANTIC TELE-NETWORK CO. APPELLEE

vs.

THE PUBLIC SERVICES COMMISSION
OF THE VIRGIN ISLANDS, and
PATRICK M. RICE, Executive
Director of the Public Services
Commission APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF
THE VIRGIN ISLANDS DIVISION OF
ST. THOMAS AND ST. JOHN

Civil No. 1987-257

APPELLANT'S BRIEF
Maria Tankenson Hodge, P.C.

By: Maria Tankenson Hodge
P. O. Box 4511
St. Thomas, V.I. 00801
(809) 774-6845

* * *

RESPONDENT'S BRIEF TO THE THIRD CIRCUIT
SEPT. 21, 1987, EXCERPT FROM P. 12

If, upon its investigation, the PSC found any act or service unreasonable, inadequate, or otherwise in violation of any of the provisions of the law, the Commission had the power to make such orders respecting

any such acts as were just and reasonable. 33 V.I.C. § 23. Here the Commission made those findings, and, indeed, ATN *conceded* before the Commission the rightness of at least one of the Commission's concerns in this regard. (See discussion infra at p. 15)

* * *

RESPONDENTS' BRIEF SUBMITTED TO THE THIRD CIRCUIT SEPT. 21, 1987, EXCERPT FROM PP. 15-16

In fact, after the Commission's consultant revealed the consequences and financial implications of the proposed sale financing terms in his testimony and written report, a principal and the attorney for ATN agreed "[T]hat the restrictions imposed by the prospective lender in this case are just too restrictive with respect to the public utility, Vitelco . . . . the restrictions placed upon the public utility, Vitelco, by the prospective lender are just too heavy a load to permit the ordinary kind of flexibility and ability to conduct business by the public utility, so that it can be deemed to be in a posture where it can provide service to the public that is reasonably priced, appropriately priced and is a very good service." (See Transcript of Public Hearing of PSC, App. A-372)

Thus, not only was there testimony during the course of the proceedings that, should the sale of Vitelco stock be consummated under the terms proposed by ATN and its third party financer, the implications would be detrimental to the rate payer, but ATN agreed. With this determination that rates and services would be affected, the jurisdiction of the PSC over the proposed sale is well founded and supported by the above referenced authority and the PSC's statutory grant.

Notwithstanding this factual record, the District Court held that ATN was entitled to judgment as a matter of law holding the Commission lacked jurisdiction to approve or condition the sale of stock under Title 30, as it stood prior to enactment of Act 5258, and proceeded to declare the Commission's order void. This ruling by the District Court was an erroneous reading of the law, where the facts showed direct adverse effects of the terms of sale on the regulated utility and should be reversed.

* * *

PUBLIC SERVICES COMMISSION
P.O. Box 40
ST. THOMAS, V.I. 00801
(809) 776-1291

IN THE MATTER OF THE APPLICATION OF THE VIRGIN ISLANDS TELEPHONE CORPORATION FOR A CHANGE IN RATES	)	PSC DOCKET NO. 277
IN THE MATTER OF THE SALE OF VIRGIN ISLANDS TELEPHONE CORPORATION STOCK TO ATLANTIC TELE-NETWORK COMPANY	)	DOCKET NO. 301
IN THE MATTER OF THE VIRGIN ISLANDS TELEPHONE CORPORATION DEREGULATION OF INSIDE WIRE	)	PSC DOCKET NO. 304
IN THE MATTER OF THE VIRGIN ISLANDS TELEPHONE CORPORATION LIFELINE RATES	)	PSC DOCKET NO. 305

VOL. I

TRANSCRIPT OF PUBLIC HEARING
February 5, 1987, 10:17 a.m.

Held in Conference Room of
the V.I. Legislature
Christiansted, St. Croix,
U.S.V.I.

BEFORE COMMISSION MEMBERS PRESENT:

ALFRED B. HAYES, Chairman

ALPHONSE ADAMS, Vice-Chairman

VALDEMAR A. HILL, JR., Commissioner

HECTOR L. RIVERA, Commissioner

GEORGE PARROTT, Commissioner

SENATOR HOLLAND L. REDFIELD, Commissioner ex-officio

PATRICK M. RICE, Executive Director

APPEARANCES:

MARIA T. HODGE, Esq., Counsel to PSC
JAMSHED K. MADAN, Consultant to PSC

* * *

SETTING—FEBRUARY 5, 1987

Mr. Jamshed K. Madan, the PSC's chief consultant, had spent all morning testifying against the First Chicago loan proposal. ATN did not offer any opposing testimony. Rather, Mr. Craig Swoboda stood up and made a conciliatory statement that in essence delivered one message: rather than get into an adversarial posture why don't we sit down and see if we can negotiate our differences. It is that statement that has been the subject matter of the PSC's Chief Counsel Briefs. In fact, negotiations did ensue as a result of Mr. Swoboda's statement.

* * *

(p. 75) AFTERNOON SESSION

The Chairman: At this time the Virgin Islands Public Services Commission will reconvene at its hearing on Docket 301 and at this time Mr. Madan is on the stand and the purchasing group is about to question him any way they see fit in relation to his testimony.

Mr. Swoboda: Mr. Chairman & members of the Commission, I was at the last hearing and you may remember I represent prospective purchasers and as I told you, I am also one of them. Also, as I told you at the last hearing

and I still mean it, irrespective of the question of the commission's jurisdiction, it is not the intention of the purchasers to take unilateral action contrary to this commission and face some unknown period of time of antagonism with this commission. It is just not our goal. We are not interested in that. At the same time, I think I mentioned at the last hearing that that little speech of mine which I truly mean is not to be interpreted as a concession of the commission's jurisdiction. That is a separate matter as I see it.

Our goal right now is to get into a legal posture. Our goal right now is to try to see whether this transaction can be consummated between this particular seller and this particular purchaser. In this case, the particular seller is ITT, the sole shareholder of Vitelco. The purchaser in this case is Atlantic Tele-network company, which is the prospective sole shareholder of (p. 76) Vitelco.

We have had the benefit of Mr. Madan's testimony this morning and his report. And I have to say again personally that much of what he says makes some sense. At the same time, I don't want that to be misinterpreted to mean that I agree with every point of view that he has expressed to the commission, because I don't.

What I come away from this morning is hearing what is really this. It is anticipated in the purchase of stock of a utility or even in the case of a public utility, that it may have some debt. Indeed, even Mr. Madan has conceded that point this morning that the utility may have debt. I don't think it's an unreasonable assumption to make. I think it's within the experience of all members of the commission, probably everyone in the room, that if

a borrower has debt, his lender is going to put some restrictions on that debt, of some sort. So, what I conclude from this morning's hearing is that the restrictions imposed by the prospective lender in this case are just too restrictive with respect to the public utility Vitelco, irrespective of the holding company, which is really a separate matter. But the restrictions placed upon the public utility Vitelco by the prospective lender are just too heavy a load to permit the ordinary kind of flexibility and ability to conduct business by the public utility, so (p. 77) that it can be deemed to be in a posture where it can provide service to the public that's reasonably priced, appropriately priced, and is a very good service.

I realize that there are one or two other issues that were raised this morning. I don't find those to be, if you will, fighting issues. I find the fighting issues to be the question of what kind of rational restrictions can a lender to a public utility place upon that utility and still give that utility the kind of business posture which will permit it to provide good and valuable service to the public at an appropriate rate.

Now in that context then, it seems to me that what we have to deal with is the questions of the restrictions imposed by the prospective lender in this case and their effect upon Vitelco.

I would urge the commission not to take a precipitous kind of action that says that they disapprove this transaction at all. I would request that the commission give the prospective purchaser of Vitelco's stock in this case, an appropriate opportunity to discuss the matter in sincerity and in good faith with the commission's staff, with an eye towards trying to come to some kind of rational restric-

tions which I think everybody would agree could be permitted. Some kind of rational restrictions that would not impose too difficult a burden upon the public utility. (p. 78) And what I would like to do is pose to Mr. Madan two questions: Number one, does he think that's a rational appratch to this problem, and number two, does he have any suggestions about what those livable, if you will, permissible restrictions might be in a case like this.

Mr. Madan: I would think that within reason that would be a reasonable approach with the following thoughts and caveats and that is that I think certain guidelines can be discussed. The problem is that the guideline, I think, would serve perhaps as a starting point to obtain a final document and it's only in the context of really looking at all the assumptions that go into the document that an overall conclusion can be reached.

Certainly if you look at one extreme, it seems to be pretty clear that if the transaction was consummated without any debt, there would be no problem—I think we all agree with that—and everyone understanding that the prospective buyers are contemplating that some level of debt be imposed. Again, I don't talk for the commission, although I don't presume to, but in terms of a proposed assessment and one that the Chairman spoke about this morning, what I would say, as a starting point, would be approximately what would be the conditions on which an ongoing utility would face. I would think of three that would be extremely common to a utility financing. One, (p. 79) that debt be limited, I believe, to a ratio of some sixty percent of company's bonds, or property.

Number Two. A reasonable debt equal equity ratio be maintained, which I would define somewhere between

forty and sixty percent of its capital structure, and that's not the entire right hand of the balance sheet, but in this case it would be forty-five to fifty million dollars of equity. And see under those conditions there's usually some restriction on the company's ability to finance in the future and those usually say that under these conditions the borrowers expect that the company will obtain a minimum coverage on the 2.0 times which generally allowed you these sort of restrictions externally financed in the—I see that as part of the starting point and what proposed buyers wanted to do, and I also can see a big gap within that and where you are. What I find is we can sit and talk about bridging the gap, but I presume that's something you all would have a great deal more input into it than we.

Mr. Swoboda: I agree with you, Mr. Madan. My only point is that in light of all the circumstances in this matter, rather than attempting to find appropriate restrictions coming to you, having you say yes and going back and so forth, that we abbreviate I think, a good deal of that trial and error approach by getting together with (p. 80) you. I appreciate what you conclude is not necessarily what the commission will conclude. I understand that. At the same time, I understand that you are in deed an advisor to the commission and they certainly rely upon you to at least give them direction in the matter. What I was proposing is that you and the prospective purchasers and perhaps counsel for the commission and anyone else that would care to be involved, instead of going through a trial and error method of saying we might achieve this and you say yeah or nay, that we can get together and try to arrive at what those appropriate restrictions might bet.

There's only one matter I want to clarify and that was when you talked about 2.0 to one, were you talking cash flow to debt service?

Mr. Madan: It would usually be defined as a pretax coverage. And that would generally be income available before interest and taxes divided by interest. And generally with those ratios, at least on a proforma basis, Vitelco should be well in excess of three times with the debt level of about twenty-five milion dollars. That should not be a problem. In other words, there will be additional outside financing capability, should the need arise, Vitelco would maintain its integrity. What I recognize is that gap between those numbers and the sales price—

Mr. Swoboda: I recognize there's a gap as well. (p. 81) But what I am suggesting here is that rather than just come to a conclusion today that the entire transaction is disapproved in light of what is in truth a considerable amount of time, effort, and money already expended in the transaction, rather than just to say let's forget it, let's disapprove the transaction. I would like to make a run at trying to achieve what you would deem to be the kind of restrictions that you could recommend to this commission. I don't think under all the circumstances that's an unreasonable position to take.

Mrs. Hodge: Excuse me, Mr. Chairman. If I could, from a legal point of view, the one concern that I would have with that effort is that we were told that there is at present a contract between a prospective buyer and a prospective seller with a fixed cut-off date proposing and at

the present time there's no commission order in effect that tells anybody really to do anything about a sale. Without such order, and in the face of such a contract, the risk to the commission would be that in time we are devoted to seeing whether staff recommendations could be developed that would be in accordance with what the lender is willing to do and the purchaser is willing to accept, that in fact the transaction would close.

Mr. Swoboda: What I tried to say in my opening statement that probably wasn't very articulate. It's (p. 82) not our intention to take that approach. It's not our intention to close this transaction in the present light.

Mrs. Hodge: If there were a stipulation in effect that the transaction would not close while this process was taking place so that the possibility of the commission choosing to exercise its discretion on the subject is mentioned and the report were protected, then I would not have a legal problem with that. I don't know whether you need ITT's consent to—

Mr. Swoboda: Let me poll the delegation, if I can, and see.

The first thing that needs to be said, I suppose, is that what I was contemplating if we could get on with this expeditiously and not have any tenuating period of time.

Mrs. Hodge: That's naturally something you strive for, but considering what it takes to get the commission convened and the fact that people come from distant quarters, if there were an amended recommendation, supplemental recommendation to offer the commission, I would not at least feel comfortable being in a position if it

couldn't be achieved, if there couldn't be a medium for the commission to give a number of days, either that you had lost your transaction certainly by default or that the commission had lost an opportunity which it may wish. . .

* * *

PSC Findings of July 7, 1988, in re Docket 316, Resulting in a Rate Decrease to Vitelco

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES
PUBLIC SERVICES COMMISSION

FINDINGS

Thursday, July 7, 1988

In Re:)
)
PSC DOCKET NUMBER 316)
)
In the Matter of:)
)
VIRGIN ISLANDS TELEPHONE)
CORPORATION 1987 RATE CASE)

MEMBERS PRESENT

ALFRED B. HAYES, Acting Chairman
ALPHONSE ADAMS, Member
MADALINE SEWER, Member
HECTOR L. RIVERA, Member

STAFF PRESENT

PATRICK RICE, Executive Director
MARIA TARKENSON HODGE, Legal Counsel
JAMSHED K. MADAN, Consultant

For Vitelco: CORNELIUS B. PRIOR, JR., Chairman of Board

JEFFREY J. PROSSER, President
PAUL J. BERMAN, ESQ., and
EDITH L. BORNN, ESQ. and
MARY ELLEN O'CONNELL, ESQ.,
Legal Counsel

(p. 2) FINDINGS:

The Chairman: At this time, the Public Services Commission will open in open session at its special meeting and announce that it has been in executive session and has reached some conclusions concerning Docket Number 316. And in the interest of clarity and brevity, the findings of the Commission will be read by our counsel.

Ms. Hodge: Mr. Chairman, according to my notes of the Commission's decision, the most useful way to put this on the record would be to begin with the schedule, with Schedule 4, page 1, of Mr. Madan's prefiled testimony which is the methodology the Commission used as to the ordering of the decisions.

According to my notes—

Ms. O'Connell: Could you give me one second so I could follow along.

(PAUSE)

Ms. Hodge: According to my notes the Commission accepted the positions of the following witnesses, treating them in the order in which they appear in this schedule.

The Commission accepted Mr. Madan's entries numbered 1, 2 and 3. Beginning with item number 4 labeled (p. 3) "Year End Annualization", the Commission voted to accept Vitelco's position and delete the staff's proposed reduction.

According to my notes the Commission accepted Mr. Madan's proposed adjustment number 5 labeled "Universal Service Fund". As to item number 6, "Directory Revenues", according to my notes the Commission voted to

adopt a twenty percent anticipated increase in annual directory revenues as against Mr. Madan's proposal of twenty-five percent increase and as against Mr. Price's suggested sixteen percent, finding this estimated increase to be very conservative.

Mr. Madan's proposed adjustment number 7, "Inside Wire", was accepted by the Commission. Mr. Madan's proposed adjustment, number 8, "Salary and Wages", was not accepted by the Commission and that proposed adjustment should be deleted.

The net effect of this finding would be that all salaries and wages as shown by the Company are accepted by the Commission for ratemaking purposes.

Item number 9 on this schedule, "Rate Case Expense", the Commission's vote was to accept the corrected schedule of expenses which showed a correction to the legal fee actually paid to Labiff-Lamb (photetics) as well as some additional fees not shown on the original (p. 4) exhibit to Covington & Burling and having accepted that corrected statement of fees and expenses paid, to allow a total rate case expense of $600,000.00 as against the recommended level of staff of $400,000.00 and to direct that this rate case expense of $600,000.00 be amortized over a period of two and a half years.

My notes indicate the Commission voted to accept the Commission's staff recommendation on depreciation expense as shown on line 10 of Mr. Madan's schedule on page 1, and to accept the proposed adjustment at line 11 for management fees or advisory fees which is to say not to allow such fees.

The Commission voted to accept the recommendations of its staff as shown on line 12, "Additional Compensation", which is the executive compensation adjustment.

The Commission voted to accept staff's recommendation at line 13 for the proper treatment of the item designated "USOA".

The Commission voted to accept the staff's recommendation for item 14, "The Regulatory Issue". Voted to accept the staff's recommendation for treatment of Deregulated Operations and Separations as shown on line 15, as well as the recommendation of the Commission's staff on item 16, "Gross Receipts Taxes" (p. 5) be adjusted in the Company's favor.

My notes indicate that the Commission voted to accept that tax recommendation that the local portion of the telephone company's tax subsidy granted by the IDC should be reflected in rate reductions. And my notes indicate that the Commission instructed that the Commission's staff be directed to draft a proposed plan to institute a lifeline program as well as a Link-Up America program which would be funded at the level of approximately $400,000.00 per annum of the rate reduction that will flow from this decision.

Ms. O'Connell: I'm sorry. Could you repeat the last sentence.

Ms. Hodge: That the Commission directed the staff to prepare a proposed plan to implement a lifeline and Link-Up America program to be funded at the level of $400,000.00 per annum from the rate reduction which is anticipated to flow from this decision.

My notes also indicate that the Commission indicated that with respect to the staff's recommendations about possible overcharges to customers of Vitelco who have been leasing customer premises equipment under the provisions of Docket Number 256, the Commission indicated it would treat that by a separate order.

(p. 6) My notes indicate the Commission wished its decision to reflect a directive to the telephone company that it wished to institute a requirement that Vitelco file with the Commission within sixty days information sufficient to permit the Commission to determine the feasibility of implementing a 911 emergency number system. The information to be filed with the Commission by Vitelco should include information on the cost of the equipment that would be required to institute the system as well as any related expenses to Vitelco in instituting or servicing the equipment, the time needed to institute the system from any revenue requirements to Vitelco associated with instituting the program and a proposed tariff, if any, together with an indication of any problems that Vitelco anticipates may arise in connection with instituting this program.

My notes of the Commission's decision indicates its decision to accept the recommendation of Mr. Lelash to adopt a capital structure for Vitelco of one hundred percent debt, allowing a rate of return of nine percent on debt. My notes indicate the Commission determined to accept the Separation testimony of Mr. Dunkel except that it determined to accept the correction described by Mr. McDaniel in his testimony associated with category 6 in

favor of the telephone (p. 7) rate payers in the amount of $294,000.00.

My notes indicate that the Commission indicated that any of the rate making issues treated in the testimony not specifically described above, may wish to adopt the recommendations of the staff, of the Commission's staff.

Ms. O'Connell: Could you just repeat when you said, "Dunkel's Separation". I didn't get the dollar amount.

Ms. Hodge: Dunkel's separation except to accept the testimony of Mr. McDaniel with respect to the correction for the item designated "Category 6" in favor of the ratepayers in the amount of $294,000.00.

My notes indicate that the Commission directed that the staff be requested to prepare a proposed tariff to implement this decision based on the correct number of telephone units actually in use as of the end of 1987 in accordance with the testimony received in this proceeding. In addition, my notes indicate that the Commission directed that an order be entered in connection with this proceeding based on the testimony taken requiring Vitelco not to transfer any further assets to affiliated companies without the prior approval of the PSC.

The Commission also indicated that the (p. 8) order should provide that Vitelco should hold in escrow any dividends or management or advisory fees payable to its affiliates until completion of court proceedings in the case of ATN vs. the PSC or until the PSC gives prior approval of such disbursements, whichever may come later.

Ms. O'Connell: I have to ask you to do it again; it is all very complicated. Could you repeat your last—paragraph.

Ms. Hodge: The Commission directed that an order should be entered requiring Vitelco to hold in escrow any dividends and management or advisory fees payable to affiliates until completion of court proceedings in the case of ATN vs. the PSC, or until the PSC grants approval to such disbursements, whichever is later.

The Commission indicated that an order should be entered reserving the right to the Commission to examine further the transaction described in the testimony under which certain assets of Vitelco were purported to be transferred to a separate affiliated corporation identified as Vitelcom and to determine whether there are any rate implications of that transfer.

Ms. O'Connell: I am sorry, could you repeat the first sentence of that.

Ms. Hodge: The Commission directed that it will reserve the right to examine further the matter (p. 9) of the transaction described in testimony in this proceeding concerning the apparent transfer of assets from Vitelco to the corporation described in the Commission proceeding as Vitelcom to determine whether there are any rate implications in that transaction.

And the Commission also indicated that it wishes to reserve the right to investigate further the reasonableness of the utility's insurance expense to determine whether there are any appropriate rate implications of that expense.

My notes indicate that the Commission also indicated its desire that the order specify that Vitelco and ATN notify the Public Services Commission in advance in the

event of a proposed sale of a material interest in ATN or Vitelco and provide details of any such transaction to the Commission in advance of its consummation.

It was my understanding at the conclusion of the executive session that the Commission desired that we prepare a brief form of proposed order on an immediate basis denying the requested increase in rates such that it could be entered within the time limits of the Code and then drafting a more detailed order setting forth the Commission's decision in each case adopting the testimony of the supporting witnesses whose position was (p. 10) adopted as the Commission's basis for a decision and calculating the precise revenue effects of each of these decisions, which order will then be reviewed by Vitelco for mathematical correctness and submitted to the Commission for approval.

My notes are in several places as the Commission went along, Mr. Chairman. I believe I covered everything you instructed me about but if any of the Commission remembers any other matters you discussed, obviously it will be entirely appropriate to add that.

Mr. Chairman: Well, I can't think of anything. What I ask is, the Commission has heard the report of the Minutes, the Notes that counsel has taken, and I would like a motion to the effect that those clearly represent what we had discussed and decided on in executive session.

Ms. Sewer: I move that we accept the Notes as read, that they are representative of the decisions that were made in executive session.

Mr. Adams: Second it.

The Chairman: Any comments? All in favor signify by "Aye".

Chorus of "Ayes".

The Chairman: It is unanimous.

(p. 11) That is the decision of the Commission on the matter of Docket Number 316. There was a matter of a cease and desist order that we had continued and I wonder if any of the Commission has an opinion.

Ms. O'Connell: I am not aware of any cease and desist order.

The Chairman: Show cause order. A show cause order. I would like to know if any of the Commission has a suggestion as to what we should do, any proposal as to what to do with this?

Ms. Sewer: I move that the show cause order be declared moot by the Commission.

Mr. Rivera: I second the motion.

The Chairman: All in favor?

(Chorus of "Ayes")

The Chairman: The show cause order that was previously issued becomes moot after the conclusion of 316 and so, the Commission no longer needs to proceed along those lines.

Is there anything else that should come before the Commission at this special meeting?

Ms. Hodge: Nothing further than I am aware of.

The Chairman: If there is nothing more to come before the Commission at this time, the Commission (p. 12) declares—adjourns the special meeting of July 7th.

This document is hereby certified to be a true and correct transcript of the foregoing proceedings.

/s/ Theodore M. Dorsett, Cm
Theodore A. Dorsett, Cm